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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-378

In the Matter of

Amendment of Section 73.606(b), Table of Assignments, TV Broadcast Stations. (Wiggins, Mississippi) — RM-5415

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1986 Released: October 16, 1986

By the Chief, Policy and Rules Division:

1. The Commission has under consideration a petition for rule making filed by South Mississippi Broadcasting Company, Inc. ("petitioner"), seeking the assignment of UHF Television Channel 56 to Wiggins, Mississippi, as that community's second commercial television service. Petitioner filed information in support of the proposal and indicated its intention to apply for the channel.

2. Wiggins (population 3,205)[1] seat of Stone County (population 9,716) is located in southern Mississippi, approximately 80 miles northeast of New Orleans.

3. UHF Television Channel 56 can be assigned to Wiggins, Mississippi, in compliance with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.

4. Comments are invited on the proposal to amend the Television Table of Assignments, Section 73.606(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Wiggins, Mississippi	43-	43-, 56+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein.

NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before December 8 1986, and reply comments on or before December 23 , 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Samuel Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Assignments, Section 73.606(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commision's Rules, 46 Fed. Reg. 11549, published February 9, 1981.*

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau (202) 634-6530. However members of the public should note that is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *exparte e* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CORPUS CHRISTI CELLULAR TELEPHONE COMPANY

File No. 30613-CL-P-112-A-84

For authority to construct and
operate a system in
Domestic Cellular Radio
Telecommunications Service for
Corpus Christi, Texas
Metropolitan Statistical Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted October 8, 1986; Released October 15, 1986

By the Common Carrier Bureau:

1. Corpus Christi Cellular Communications (CCCC) and the Alliance[1] have filed petitions to deny the application of Corpus Christi Cellular Telephone Company (CellTel). Responsive pleadings were filed.

2. On February 24, 1986, American Cellular Enterprises (ACE) was drawn as the tentative selectee in the lottery for this MSA. ACE was a member of the CellTel partnership, a pre-lottery settlement group. Through amendments CellTel has been substituted as the tentative selectee.

3. CCCC contends that CellTel has failed to provide a reasonable assurance of available financing. It asserts that the bank letters from the Provident National Bank and the First National Bank of Chicago are merely "boiler plate", "cut and paste", intended "for some other multiple market applicant". CCCC further argues the letters omit pertinent loan terms, such as what guarantees are required and whether CellTel will agree to such terms.[2]

4. The Alliance argues that ACE failed to meet the non-wireline eligibility criteria of Section 22.902(b) of the Rules in that 49% of ACE is owned by Southland Mobilcom, Inc., a wholly owned subsidiary of Southland Communications Corp., the parent company of Southland Telephone Co. (Southland Telco), a local wireline exchange in Atmore, Alabama. The Alliance states there is a substantial question whether control of ACE vests in an eligible wireline entity in that 49% interest is not a minor interest, relying upon *Advanced Mobile Phone Service , Inc. (L . A . Order)*, 93 FCC 2d 683 (1983). It asserts that since Southland Telco's wireline expertise would "undoubtedly be employed", Southland Telco would be in control of the non-wireline facility here. The Alliance further contends that ACE failed to prove it was financially qualified because it submitted an undated balance sheet; its bank letter from the United Bank was a "dear applicant" type letter previously found to be defective in *Cellular Radio Service*, 101 FCC 2d 577 (1985). Also the Alliance stated that the United Bank indicated its commitment "greatly exceeds the legal lending limit of United Bank and is conditioned on the participation of other [unspecified] banks in assuming that part of the loan", citing *Advanced Mobile Phone Service , Inc . Philadelphia)*, 52 Rad. Reg. (P&F) 2d 1593 (1983); *Advanced Mobile Phone Service , Inc . (Phoenix)*, 53 Rad. Reg. (P&F) 2d 12 (1983).[3]

Discussion

5. In the *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 219 (1984), we required all applicants for markets 91 -120, such as Corpus Christi, to provide a reasonable assurance of financial ability to construct and operate their proposed system. We have reiterated that we have long relied upon the reasonable assurance test of *Multi - State Communications , Inc . .*, 590 F. 2d 1117 (D.C. Cir. 1978), *cert . denied*, 440 U.S. 959 (1979), and that in applying such test we determined a bank letter must identify the applicant, be market specific and contain sufficient terms of the proposed loan. *Round IV Cellular Applications - Financial Qualifications , Order on Reconsideration*, FCC 86-46, Mimeo No.36444, para. 7, released January 24, 1986. We recently reviewed the almost identical bank letter from First Chicago Bank in *Shreveport Cellular Co .*, Mimeo No.6826, released September 11, 1986, and found that letter complied with our reasonable assurance standard. Likewise we find that First Chicago Bank letter to CellTel fully complies with our financial standards.

6. Regarding whether ACE met the reasonable assurance test, we observe that the United Bank letter to ACE recites that its lending commitment to cellular applicants exceeds the bank's lending limit. The letter further stated that other banks might assume that portion of the loan, but did not identify any particular bank. In these type of circumstances the Commission may adduce a further showing to determine the availability of the secondary financing and the identity of the bank. *See, KIST Corp .*, 99 FCC 2d 173, 178 (R. Bd. 1984); *Intercontinental Communications Cellular , Inc . (S a g i n a w O r d e r), Mimeo No.* DA8611, *released October 7, 1986. CellTel in its reply to Alliance's Petition to Deny filed a letter from the South Trust Bank, dated June 16, 1986, stating that " we are willing to favorably consider to participate up to the full amount in a loan to ACE ". We have recently indicated that such showing is insufficient to establish a reasonable assurance in our S a g i n a w O r d e r . I d . at para. 24. The appropriate showing is that the bank is willing to participate in lending the necessary funds. Here the South Trust Bank letter does not meet our reasonable assurance standard and can not be counted towards ACE's financial showing.*[4] *As a result, we conclude that ACE lacks the necessary financial qualifications and that its application is defective. Since ACE's application is defective, we must deny the application of CellTel.*[5]

7. Accordingly, IT IS ORDERED That the Joint Petition to Deny or Dismiss filed by the Alliance IS GRANTED.

8. IT IS FURTHER ORDERED That the Petition to Deny filed by Corpus Christi Cellular Communications IS DENIED.

9. IT IS FURTHER ORDERED That the application of Corpus Christi Cellular Telephone Company , File No. 30613-CL-P-112-A-84 IS DENIED.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. S *e e Section 1.4(b)(2) of the Rules.*

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Alliance consists of applicants who entered into a partial settle- ment agreement in the Corpus Christi MSA.

[2] Each bank proposed to finance $5 million dollars individually to CellTel. The proposed cost of construction and first year operating expenses for the proposed cellular system is $4.5 million.

[3] CCCC and the Alliance further assert that CellTel did not make the required disclosures pursuant to Section 22.13(a)(1)(i) of the Rules since it did not disclose for its five member executive committee the subsidiaries or business interests in which these members held 5% or more interest. This very same argument was rejected in *Huntington Cellular Telephone Co.*, Mimeo No. 7087, paras. 9-11, released September 25, 1986. Upon review of the financial data submitted by CellTel, we conclude that CellTel complied with our financial disclosure rules.

[4] We have also determined that ACE failed to satisfy the net liquid asset test. *See Armstrong Telephone Co.*, Mimeo No.6828, released September 12, 1986. At the time it filed its application it provided an undated balance sheet listing its assets of $40,000.00. We have reviewed CellTel's explanation that this balance sheet was current at the time it was filed, but that through inadvertence the date was omitted. We find that the balance sheet was current and in compliance with our rules. However, the sum indicated on the balance sheet is insufficient to meet the proposed $4.5 million cost of construction and initial first year operating expenses. In an amendment of June 18, 1986, CellTel submitted in part an additional financial showing for ACE. CCCC filed a petition to strike the entire amendment, which was opposed by CellTel. The portion of the amendment concerning ACE's financial showing is not permitted by the rules and will not be accepted. *See also, Round IV Order on Reconsideration, supra. The remainder of the amendment will be accepted.*

[5] Since we have concluded that ACE is financially disqualified we need not reach the issue of whether Southland Telco's 49% interest in ACE is a prohibited interest in violation of our eligibility rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-85-12

In the Matter of

PAN AMERICAN SATELLITE CORPORATION,

Complainant,

v.

COMMUNICATIONS SATELLITE CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted October 6, 1986; Released October 15, 1986

By the Commission:

1. Communications Satellite Corporation ("Comsat") has petitioned the Common Carrier Bureau to reconsider its Order, *Pan American Satellite Corp .v .Communications Satellite Corp.*, Mimeo No. 4988, released June 6, 1985 *(Order)*.[1] In the *Order* the Bureau directed Comsat to remove from its jurisdictional accounts all lobbying expenses incurred on its own behalf or as United States Signatory to the International Telecommunications Satellite Organization ("INTELSAT") which relate to the issue of separate satellite systems. For the reasons discussed below, we deny Comsat's petition and affirm the Bureau's *Order*.

I. BACKGROUND

2. Since March 1983 several applicants, including Pan American Satellite Corporation ("PanAmSat"), filed applications with the Commission to construct, launch, and operate international communications satellite systems separate from the INTELSAT system. Both Comsat and INTELSAT expressed their opinions on this issue before the legislative and executive branches of government as well as in formal pleadings before the Commission. On November 28, 1984, President Reagan issued Presidential Determination No. 85-2, 49 Fed. Reg. 46,987 (Nov. 28, 1984), wherein he declared that pursuant to the Communications Satellite Act of 1962, 47 U.S.C. §§ 701(d), 721(a), separate international communications satellite systems are required in the national interest. On July 25, 1985, the Commission adopted a Report and Order announcing its policy on non-INTELSAT satellite systems.[2] It also conditionally authorized six separate satellite systems to offer international communications services not interconnected with the public switched network.[3]

3. PanAmSat filed a complaint alleging that both Comsat and INTELSAT launched a major lobbying effort in response to this Presidential Determination to prevent implementation of a policy supporting separate satellite systems. It urged the Commission to prohibit payments by Comsat to INTELSAT for these lobbying expenses and to find the inclusion of such expenses in Comsat's jurisdictional operating expenses unreasonable and unjustified. In its *Order*, the Bureau rejected PanAmSat's argument that Comsat should be prohibited from making payments to INTELSAT for its share of the expenses INTELSAT incurred lobbying against the establishment of separate international communications satellite systems. However, it ordered Comsat to charge to its nonjurisdictional accounts all expenses for lobbying on the issue of separate international satellite systems incurred either on its own or as U.S. Signatory to INTELSAT after the Presidential Determination was issued. In addition, it ordered Comsat to submit quarterly reports to the Commission detailing its identifiable expenditures for the purpose of lobbying on this issue.

II. CONTENTIONS OF THE PARTIES

4. Comsat seeks reconsideration of the Bureau's decision on the grounds that, contrary to statements in the *Order*, the Commision has not consistently required lobbying expenses to be treated as nonoperating expenses, and should not do so now. Furthermore, it asserts that regardless of the Commission's general treatment of lobbying expenses, Comsat may not be ordered to exclude from its jurisdictional accounts payments to INTELSAT that it is required to make under a binding international agreement.

5. Specifically, Comsat alleges that the Bureau's *Order* is based on a proposed new Uniform System of Accounts (USOA), which is not yet in effect.[4] Therefore, it argues, the Administrative Procedure Act[5] prohibits its application here unless it can be justified on the basis of existing rule or precedent. Comsat disputes, however, the Bureau's statement that "the Commission has consistently required even those carriers not subject to the USOA to include lobbying expenses in . . . non-operating 'below-the-line accounts.'"[6] First, Comsat maintains that the Bureau relied primarily on unpublished precedent which, it claims, cannot establish agency policy. Comsat states that it would not dispute the Bureau's *Order*, even though based on unpublished authority, if the Commission had consistently required carriers to treat "lobbying" as a nonoperating expense. (Petition at 8) As evidence that the Commission has not consistently so treated it, Comsat notes that while the letters cited in the *Order* purport to "remind" carriers that lobbying expenses must be charged to nonoperating Account 323, in fact they require carriers to treat *only* expenses associated with a particular legislative proposal in this fashion.[7]

6. Comsat alleges that the one published precedent cited in the *Order*, "Case 22" in the existing USOA,[8] is inapposite and deals only with advertising, not lobbying expense. It reiterates that there is a significant difference between an advertising campaign and direct contacts with members of Congress and their staffs. On the other hand, Comsat maintains that there is published precedent that deals with lobbying. It cites the Commission's rejection of the Common Cause request to adopt rules requiring carriers to account specifically for "lobbying" expenditures.[9] In that order, according to Comsat, the Commission cited with approval an analogous tax case which held that appearances before both legislative and administrative bodies are deductible. *Southwestern Electric Power Co .v . United States*, 312 F.2d 437, 444-45 (Ct. Cl. 1963) (*Southwestern Electric*). Moreover, Comsat quoted the following Commission statement:

> Even the Internal Revenue Code of 1954, 26 USC § 162(e), does not define as lobbying appearances, statements and communications to or before committees or members of Congress or state or local legislative bodies whe they relate to legislation or propose legislation which is of direct interest to the taxpayers.[10]

Comsat reads these references to imply that the Commission's own accounting policy would automatically follow tax accounting policy. It emphasizes that all of the activities the Commission ordered excluded from Comsat's jurisdictional accounts in the Bureau's *Order* were "communications to or before committees or members of Congress" and "are therefore within the category of expenditures that the Commission relied on as legitimate above-the-line expenses in rejecting Common Cause's attempt to place all 'lobbying' expenses below the line." (Petition at 13) Comsat asserts the Bureau is bound by that decision and that the Commission itself could not renounce its previous reliance on the tax code without explaining its departure from precedent. Moreover, Comsat argues, the Commission should defer to Congressional policy, as evidenced by the tax code,[11] to treat the expenses of communicating with legislators the same as communications with other branches of government. To treat all lobbying expenses as suspect, avers Comsat, "implies that communications with Congress are less legitimate than communications with the Commission, the courts, or the Executive." (Petition at 16) Comsat concludes that while there may be more than one rational place to draw the line between operating and nonoperating expenses, drawing it between the Commission and Congress is irrational.

7. Finally, Comsat maintains that however lobbying expenses are treated in general, it may not be ordered to exclude from its jurisdictional accounts payments that it is required to make to INTELSAT. It notes that although the Bureau's *Order* recognized that Comsat had to pay its full share of INTELSAT'S expenses, including lobbying expenses, nevertheless the Bureau ordered Comsat to treat INTELSAT's lobbying expenses as nonoperating. Comsat argues that the Bureau erred in its conclusion that Comsat controlled INTELSAT's activities or could change these practices through the arbitration process. Comsat points out that it owns approximately twenty three percent of INTELSAT. Since a two-thirds vote is generally required for INTELSAT to act, Comsat can influence what INTELSAT does only if it can persuade other Signatories with a forty-three percent ownership to agree. Therefore, it argues, the *Order's* suggestion that Comsat could accomplish through INTELSAT what it is prohibited from doing on its own, *i.e.* charging its ratepayers with lobbying expenses incurred on its own behalf, is completely unrealistic.[12] Comsat also alleges that the arbitration mechanism referred to in the Bureau's *Order* would not allow Comsat to compel INTELSAT to lower its lobbying costs. The INTELSAT Agreement provides for arbitration only in case of "legal dispute" (Act XVIII), and nothing in the agreement prohibits it from approaching the legislative branch of a Signatory's government, alleges Comsat; indeed, Article XIV(d) requires that governments consult with INTELSAT on the subject of separate systems. Since in reality Comsat has no control over the lobbying part of its INTELSAT payments, Comsat alleges that the part of the *Order* which requires it to remove its share of INTELSAT's lobbying expenses from its jurisdictional accounts should be reconsidered.

8. PanAmSat disputes Comsat's contentions. Preliminarily, it asserts that Comsat fails to distinguish between formal appearances and filings before legislative bodies and traditional lobbying such as activites designed to influence the opinion of public officials. It points out that both its complaint and the Bureau's *Order* focused on traditional lobbying expenses. It notes that the Common Cause petition upon which Comsat relies attempted to include formal appearances in its definition of lobbying, and was therefore rejected by the Commission as being "overbroad and unworkable." 92 FCC 2d at 155. PanAmSat also asserts that Comsat mischaracterizes the Commission's citation to *Southwestern Electric* and the Internal Revenue Code of 1954. It maintains that even a cursory examination of the *Common Cause* Order shows that the Commission's only purpose in citing these two sources was to show that Common Cause's definition of lobbying was too broad.

9. As for the issue of the precedential value of the Commission's letters regarding the treatment of lobbying expenses, PanAmSat quotes Section 0.445(e) of the Commission's Rules, 47 C.F.R. § 0.445(e), which provides that unpublished Commission documents "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question . . . ." In the instant case, according to PanAmSat, since Comsat was an addressee of the letters, the authority cited by it is inapposite, and the letters were properly used as precedent by the Bureau. PanAmSat argues that the Commission has routinely interpreted Case 22[13] as dealing with both advertising and lobbying expenses, citing Letter from Chief, Common Carrier Bureau, to Comsat, *et al.* (Aug. 13, 1976). Despite Comsat's assertions to the contrary, says PanAmSat, the Bureau's *Order* does not attempt to apply the proposed USOA (Uniform System of Accounts)[14] to Comsat in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* The Bureau's *Order* recognizes that the USOA does not apply to Comsat. Furthermore, it clearly states that the proposed Account 32.7370 is only a recommendation, but that it reflects the Commission's intention to *retain* the requirement that lobbying expenses not be included in jurisdictional accounts. PanAmSat also takes issue with Comsat's contention that the Commission is obligated to "pay considerable deference" to the expression of Congressional intent permitting the deductibility of political expenses from gross income in the tax code.

10. Finally, PanAmSat argues that Comsat's obligation to contribute to INTELSAT's expenses is separate from the question of which costs Comsat may include in its rate base. Although this complaint is the first in which the Commission has had to determine whether certain INTELSAT expenses are properly chargeable to Comsat's jurisdictional accounts, in 1980 the Commission recognized that it might disallow part of INTELSAT's expenses from Comsat's rate base or order changes in the accounting methods if it found that ratepayers should not bear some of INTELSAT's expenses. *Communications Satellite Corp.*, 82 FCC 2d 377 (1980). Thus, argues PanAmSat, the Commission has the authority, and, indeed, is obliged to determine whether it is reasonable for Comsat to charge its ratepayers for these lobbying expenses.

11. In its reply Comsat alleges that PanAmSat ignored Comsat's main argument, namely that the branches of government should be treated equally, and therefore legislative expenses should be treated the same as expenses incurred when participating in judicial and administrative proceedings. Likewise, according to Comsat, PanAmSat

failed to refute Comsat's showing that the Commission has not consistently applied a policy of treating lobbying expenses as nonoperating expenses. Finally, Comsat concludes that its legislative expenses as well as its payments to INTELSAT are legitimate operating expenses which should be recovered in rates.

III. DISCUSSION

12. Upon review, we find Comsat's arguments that we have not consistently treated lobbying expenses as nonoperating expenses to be without merit. First, the Bureau's *Order* is not based on a proposed new USOA,[15] as Comsat has alleged, but on existing precedent established over at least a decade. As clearly stated in the underlying *Order*, based on the present USOA, the Commission has consistently required that lobbying expenses be treated as nonoperating expenses for accounting purposes not only for carriers subject to the USOA, but also for those carriers not subject to the USOA. The proposed USOA was cited only to show that this policy would be retained under the the proposed new USOA; it did not enunicate a new policy. *Order* at para. 8. The fact that this policy was generally stated in unpublished letters does not detract from their precedential value as long as the affected parties had actual notice of the documents. 47 C.F.R. § 0.445(e). Comsat apparently had actual notice of these documents.[16]

13. Moreover, this policy applies to all lobbying expenses, not just those associated with particular legislation. Comsat apparently misinterprets the thrust of the letters cited in the *Order*. Since all carriers are expected to know that lobbying expenses are to be included in nonoperating "below-the-line" accounts, the Commission does not routinely remind them of the proper treatment of these expenses. However, in certain circumstances, such as when it comes to the Commission's attention that a certain carrier is incurring substantial lobbying expenses in connection with proposed legislation, and the question arises whether the carrier is accounting for them properly, the Commission informs the affected parties of its concern regarding the proper accounting for these expenses. This is often done in the form of a letter which, as in the case of the letters cited in the *Order*, not only mentions the specific legislation being lobbied for or against at the time, but also reminds the carriers that the Commission's Rules require treating lobbying expenses as a miscellaneous income charge. Thus, the letter is not directed toward only those lobbying expenses associated with particular legislation, but toward lobbying expenses in general.

14. The published precedent relied upon by Comsat to support its position that lobbying should be treated as an operating expense is inapposite. First, we reject Comsat's argument that Case 22 of the USOA deals only with advertising, rather than lobbying as well. The Commission has consistently interpreted this case as dealing with both advertising and lobbying expenses. *See, e . g.*, Letter from Chief, Common Carrier Bureau, to Comsat, *et al.* (Aug. 13, 1976). Second, the *Common Cause* decision and the references in that case to *Southwestern Electric* and the Internal Revenue Code[17] do not stand for the proposition that lobbying expenses are operating expenses for ratemaking purposes. Common Cause had requested that the Commission issue rules requiring detailed reporting by carriers of their lobbying expenses. The petition was denied because petitioner did not demonstate a need for such a rule. In its denial, the Commission also rejected Common Cause's definition of "lobbying," which would have included all appearances before legislative and administrative bodies without regard to the purpose of such appearances. *Southwestern Electric* and the Internal Revenue Code were clearly cited only in the context of demonstrating that Common Cause's definition of lobbying was too broad, and not to delineate the proper accounting treatment of lobbying expenses. Whether certain expenses should be deductible in computing income taxes is unrelated to whether those expenses should be borne by ratepayers or shareholders. Nothing in the *Common Cause* case even intimated that the Commission was changing its stance that lobbying expenses were to be treated as nonoperating expenses. Therefore, the Bureau's *Order* is in no way inconsistent with the Commission's *Common Cause* decision.

15. Moreover, there is no justification for Comsat's conclusion that classifying lobbying expenses as nonoperating below-the-line expenses implies that communications with Congress are less legitimate that those with other branches of government. As stated in the underlying *Order*, the Commission defines lobbying as "conducting activites aimed at influencing public officials, especially individual members of a legislative body, on legislation." *Order* at para. 6, quoting from *Reporting Lobbying Expenses by Regulated Carriers*, 92 FCC 2d 153, 156 n.2 (1982). Not all contacts with public officials are included within this definition. For example, testimony before a governmental body and record participation in formal procedings instituted by a governmental body are not within the definition of lobbying. Thus, Comsat's formal communications with Congress enjoy the same status as its communications with the other branches of government. The vast majority of a carrier's contacts with an administrative agency deal with current and future operating practices and are required in the conduct of its business. They are therefore unlike contacts with members of Congress and their staffs for the purpose of influencing officials to vote a particular way on specific legislation. Moreover, the Commission does not question the legitimacy of lobbying activities, but only ensures that carriers properly account for the expenses.

16. Finally, we turn to Comsat's allegations that the Bureau erred in its conclusion that Comsat controlled or could change INTELSAT's activities, and that regardless of how lobbying expenses are treated in general, Comsat may not be ordered to exclude its share of INTELSAT's lobbying expenses from its jurisdictional accounts. The Bureau did not conclude in the underlying *Order* that Comsat can control INTELSAT's activites. Although it suggested that Comsat might wish to exercise its legal voting rights to dispute certain obligations imposed by INTELSAT, the Bureau's decision was not conditioned on Comsat's success in reducing or eliminating such expenses. Since the Commission's policy is that lobbying expenses are not ordinarily charged to ratepayers, but instead should be borne by stockholders,[18] Comsat's share of INTELSAT's lobbying expenses should also be charged to stockholders.[19]

17. Therefore, we reject Comsat's conclusion that all of its legislative expenses as well as its payments to INTELSAT are operating expenses.[20] As the Bureau stated, the decision to require that lobbying expenses be treated as nonoperational expenses does not abrogate the utility's right to engage in lobbying activities, but rather assures the proper accounting for the cost of such activities. *Order* at para. 16. The bureau correctly required Comsat to

separate out lobbying expenses. For the above-stated reasons, we find no basis for reconsidering the Bureau's decision, and we affirm its accounting treatment of both Comsat's lobbying expenses and Comsat's share of INTELSAT's lobbying expenses.[21]

18. Accordingly, IT IS ORDERED that the petition for reconsider- ation filed by Communications Satellite Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Pursuant to 47 C.F.R. § 1.106(a)(1), the Bureau referred the petition directly to the Commission to conserve Commission resources by eliminatingone possible stage of review.

[2] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985) (Separate Systems decision). Reconsideration denied, FCC 86-144, (released Apr. 17, 1986).

[3] International Satellite, Inc., 101 FCC 2d 1201 (1985); Pan American Satellite Corporation, 101 FCC 2d 1318 (1985); RCA American Communications, Inc., 101 FCC 2d 1342 (1985); Cygnus Satellite Corporation, 101 FCC 2d 989 (1985); Orion Satellite Corporation, 101 FCC 2d 1302 (1985); and Financial Satellite Corporation, FCC 86-13 (released Jan. 15, 1986).

[4] The proposed USOA explicitly addressed "lobbying" expense and required it to be booked to Account 7370, a below-the-line account. Below-the- line accounts are not automatically disallowed in ratemaking, but contain costs "normally disallowed or given special scrutiny in ratemaking proceedings." Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules) (Further Notice of Proposed Rulemaking), CC Docket No. 78-196, 50 Fed. Reg. 1590, paras. 28-31 & Appendix A, Account 32.7370 (unpublished), and Appendix B, Account 32.7370 (1985). The proposed USOA, with modifications, was adopted May 1, 1986, and becomes effective January 1, 1988. FCC 86-221. This USOA includes proposed Section 32.7370.

[5] 5 U.S.C. § 553(c).

[6] *Order* at para. 7.

[7] To buttress this argument, Comsat avers that AT&T engaged in extensive lobbying in 1984, and yet the associated expenses do not appear in AT&T's annual report for 1984 where it lists the ten largest categories charged to Account 323 (in this case the smallest listed was $75,000).

[8] 47 C.F.R. Part 31, Appendix A, Case 22 (1946).

[9] Reporting Lobbying Expenses by Regulated Carriers, CC Docket No. 78-373, 92 FCC 2d 153 (1982)(*Common Cause*).

[10] 92 FCC 2d at 156.

[11] S. Rep. No. 1881, 87th Cong., 2d Sess. 22, *reprinted in* [1962] 2 U.S. Code Cong. & Ad. News, 3304, 3325.

[12] Comsat cites as an example its unsuccessful attempt to reduce the size of INTELSAT's "Professional Fees" budget. (Petition at 20)

[13] 47 C.F.R. Part 31, Appendix A, Case 22 (1946).

[14] 47 C.F.R. § 32.7370. *See* note 2, *supra*.

[15] As explained in note 2, *supra*, the proposed USOA has subsequently been adopted with modifications and will become effective January 1, 1988. Section 32.7370 was adopted virtually unchanged.

[16] We may with fair reliability assume that Comsat had actual notice of these documents since it was an addressee of at least two of these letters. Letter from Chief, Accounting Branch, Common Carrier Bureau, to Comsat, *et al.* (Nov. 13, 1978), and letter from Chief, Common Carrier Bureau, to Comsat, *et al.* (Aug. 13, 1976). Comsat has failed to assert that it had no actual notice of these letters. In any event, it now obviously has actual notice of the precedent and can be held to the terms of those decisions in the future.

[17] *See* para. 6, *supra*.

[18] The difference betweeen the treatment of expenses for accounting and ratemaking purposes should be clarified. Accounting policies determine to which accounts certain expenses should be booked, whereas ratemaking determines what expenses can be recovered in rates to the consumer. The accounting treatment of lobbying expenses as nonoperating expenses does not automatically control whether they may be included in revenue requirements. Expenses booked to Account 323 (such as lobbying expenses) are normally disallowed in ratemaking. However, in a tariff filing or a rate case, if a carrier makes a direct, complete, and persuasive argument for the inclusion of some of these expenses, the Commission will consider permitting the expenses to be included in revenue requirements.

[19] As the U.S. Signatory to INTELSAT, Comsat is responsible for a portion of INTELSAT's costs. However, the Commission has the authority to order the removal of part of Comsat's investment contributions to INTELSAT from its rate base or order a change in Comsat's methods of accounting for the expenditures if it finds that public interest, convenience, and necessity require such action. Communications Satellite Corporation, 82 FCC 2d 377, 385 (1980). Indeed, in the Comsat Structure Proceeding, 97 FCC 2d 145 (1984) (*ComsatStructure*), upon a determination that the INTELSAT Agreement and the Communications Satellite Act of 1962 accorded it broad latitude in defining the scope of Comsat's mission, the Commission revised Comsat's cost allocation formulas and removed from its jurisdictional accounts certain INTELSAT-related general and administrative and research and development expenses. *Comsat Structure*, at 164-76.

[20] Comsat provided no additional arguments to support its position. Its arguments were fully analyzed in the *Order* below, and there is no reason to repeat them here.

[21] The Bureau *Order* required Comsat to file quarterly reports to the Commission identifying all of its and INTELSAT's identifiable expenditures for the purpose of lobbying on the issue of separate international satellite systems. We note that the last three quarterly reports indicate that neither Comsat nor INTELSAT incurred such expenses. Therefore, Comsat need no longer file a report for those quarters in which no such expenses are incurred.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-396

In the Matter of

Amendment of the maritime services rules to provide for the licensing of portable ship earth stations. RM-5414

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1986 ; Released: October 15, 1986

By the Commission:

1. Gearhart Industries, Inc. (Gearhart) filed comments in PR Docket No. 85-145[1] asking that the rules be amended to provide for licensing of portable satellite earth stations. Although beyond the scope of that proceeding, Gearhart's comments are here being treated as a petition for rulemaking.

2. Gearhart serves the petroleum drilling industry by communicating batch lots of data between drilling rigs and land based computer centers at critical moments in the drilling operation. To provide this service, Gearhart uses a portable satellite system that can quickly and economically be deployed to meet data and voice communication requirements of several drilling ships and a variety of platforms located in the marine environment. This type of operation is not presently contemplated in our rules and Gearhart is seeking a means to license their portable equipment to operate at drilling sites independent of any station license which exists locally.

3. Gearhart contends that the owner or operator of the portable satellite earth station equipment should be eligible to be the licensee of a new category of station to meet this communication requirement. Gearhart has experienced licensing difficulty because current rules provide that only owners or operators of ships are eligible for any type of ship station license including ship earth stations. Gearhart urges that any category of station created by the Commission to fulfill this offshore industry communication requirement be authorized to operate from drilling ships, mobile offshore platforms and from fixed offshore platforms. Current rules provide that drilling ships and mobile platforms are licensed as ships while fixed platforms are treated as land and not permitted to be licensed as ship stations. Finally, Gearhart argues that the simplicity of their equipment is such that a skilled operator is not required. Therefore they seek exemption from operator licensing requirements.

4. We believe that the offshore industry communication requirement delineated by Gearhart is a valid one which should be accommodated by the Commission's rules. The rules currently provide for the licensing of a portable ship station when the applicant can justify the use of a single transmitter from two or more ships owned or operated by the applicant. We consider that Gearhart's satellite communications requirements are analogous to the requirements which supported the creation of the portable ship station license. Therefore, we feel Gearhart's requirements can best be met by amending our rules to provide for the licensing of portable ship earth stations. Equipment acceptable for licensing in this manner for use in the International Maritime Satellite Organization (INMARSAT) space segment would have to meet INMARSAT requirements and procedures as well as Commission requirements applicable to the licensing of ship earth stations.

5. As to license eligibility, we are proposing that the supplemental eligibility requirements for satellite stations be amended to include the owner or operator of portable ship earth station equipment which will be used to furnish satellite communication services from more than one ship or fixed offshore platform located in United States domestic or international waters.

6. Regarding the category of station to be established, we consider that the proposed portable ship earth station will provide the necessary flexibility. Drilling ships and mobile platforms are both considered as ships and we are proposing to expand the scope of service for portable ship earth stations to include fixed offshore platforms located in the marine environment. This scope of service expansion is consistent with the INMARSAT Convention[2] which recognizes the utilization of the INMARSAT space segment from earth stations located on a structure operating in the marine environment other than a ship.

7. The Commission's current rules require operators of ship earth statiors to hold a restricted radiotelephone operator permit (RP). Section 318 of the Communications Act permits the Commission to waive the requirement for an operator's license except for stations for which licensed operators are required (1) for safety purposes or (2) by international agreement. Article 55, No. 3862, of the ITU Radio Regulation states, "The service of every ship earth station shall be controlled by a person holding a certificate issued or recognized by the government to which the station is subject." The Commission has relaxed the requirement for RP's in cases where it was appropriate to do so, as in the case of VHF operations on board voluntary equipped ships when on domestic voyages.[3] However, in light of the above-quoted international regulation which applies specifically to portable ship earth stations, we consider that any relaxation of operator requirements would be inconsistent with the Communications Act.

8. The proposed amendments to the Commission's rules set forth in the attached Appendix are issued under the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). The amendements proposed in this proceeding address revisions in the recently adopted Part 80 (Stations in the Maritime Services) of the rules which became effective October 2, 1986.

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§1.415 and 1.419, interested parties may file comments on or before December 8, 1986 and reply comments on or before December 23, 1986 . All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

10. This is a non-restricted notice and comment rule making proceeding. *See* Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231, for rules governing permissible *ex parte* contacts.

11. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements. The proposal will slightly

decrease burden hours imposed upon the public because the number of applications to fulfill licensing requirments will be lessened.

12. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because if promulgated, it will not have a significant economic impact on a substantial number of small entities. These proposed rules will permit the licensing of portable ship earth stations to serve those in the offshore industry with a need to use newly available portable satellite equipment. The proposed rules impose no new equipment carriage requirements.

13. IT IS ORDERED, That a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

14. Regarding questions on matters covered in this document, contact Robert E. Mickley, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48, Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.1185 is revised to read as follows:

§80.1185 Supplemental eligibility requirements for satellite stations.

Stations in the maritime mobile-satellite service must meet the eligibility requirements contained in this section.

(a) A station license for a ship earth station may be issued to:

(1) The owner or operator of a ship;

(2) A corporation proposing to furnish a nonprofit radio communication service to its parent corporation, to another subsidiary of the same parent, or to its own subsidiary, where the party to be served is the owner or operator of the ship aboard which the ship earth station is to be installed and operated.

(b) A station license for a portable ship earth station may be issued to the owner or operator of portable earth station equipment proposing to furnish satellite communication services on board more than one ship or fixed offshore platform located in the marine environment.

3. Section 80.1187 is revised to read as follows:

§80.1187 Scope of communication.

Ship earth stations must be used for telecommunications related to the business or operation of ships and for public correspondence of persons on board. Portable ship earth stations are authorized to meet the business, operational and public correspondence telecommunication needs of fixed offshore platforms located in the marine environment as well as ships. The types of emission are determined by the INMARSAT organization.

4. Section 80.1189 is added to read as follows:

§80.1189 Portable ship earth stations.

(a) Portable ship earth stations are authorized to operate on board more than one ship. Portable ship earth stations are also authorized to be operated on board fixed offshore platforms located in international or United States domestic waters.

(b) Where the licensee of the portable ship earth station is not the owner of the ship or fixed platform on which the station is located, the station must be operated with the permission of the owner or operator of the ship or fixed platform.

FOOTNOTES

[1] PR Docket No. 85-145 was a consolidation of Parts 81 and 83 of the rules into a new Part 80. Substantive matters were not addressed. See, FCC 86-141, released April 25, 1986, 51 FR 31206, published September 2, 1986.

[2] INMARSAT Convention, TIAS-9605; UST1; September 3, 1976; Article 7.

[3] See Report and Order, PR Docket No. 84-760, FCC 85-42, released January 30, 1985, 50 FR 5590, published February 11, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

RAYSTAY CO. CSC-316
d/b/a/ TV CABLE OF CARLISLE

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1986 Released: October 15, 1986

By the Commission:

1. On February 6, 1986, Gateway Communications, Inc. ("WLYH-TV"), licensee of Station WLYH-TV (CBS, Channel 15), Lancaster, Pennsylvania. filed an "Application for Review" of the decision of the Chief of the Video Services Division, Mass Media Bureau, in *Raystay Co ., Inc.*, Cable Television Actions Report No. 3011, Mimeo No. 2414 (released February 4, 1986). By that action, the Division Chief, pursuant to delegated authority, dismissed WLYH-TV's petition for issuance of an order to show cause and for the initiation of forfeiture proceedings against Raystay Co. d/b/a TV Cable of Carlisle ("Raystay"), operator of a cable television system serving Carlisle, Pennsylvania, and neighboring communities, for Raystay's alleged violation of the Commission's network program nonduplication rules. Raystay has opposed WLYH-TV's application for review. [1]

2. Pursuant to the Commission's network program nonduplication rules, a cable television system located within the 35-mile specified zone of a commercial television broadcast station must, upon request, delete the duplicating network programming of lower priority signals. If, however, the requesting station is in a smaller television market, as defined by Section 76.5(i) of the Commission's Rules, the cable operator will incur network nonduplication obligations if its community unit is located within *55miles* of the requesting station. *See* Section 76.92 of the Rules. The instant case involves the issue of whether WLYH-TV is licensed to Lancaster, Pennsylvania, alone or to Lancaster and Lebanon, Pennsylvania, concurrently. If licensed only to Lancaster, WLYH-TV would have no network nonduplication rights on Raystay's cable systems, because Carlisle is outside Lancaster's 35-mile zone. [2/] If licensed to Lebanon, WLYH-TV would have network *nonduplication rights against Raystay, since Lebanon, if it had a commercial station licensed to it, would constitute a smaller television market, encompassing Carlisle within its 55-mile zone. WLYH-TV argues that it would also be entitled to nonduplicaton rights within 55 miles of Lebanon if it were licensed to both communities.*

3. On June 27, 1984, WLYH-TV filed a "Petition for Issuance of an Order to Show Cause and the Initiation of Forfeiture Proceedings" against Raystay. WLYH-TV maintained that, although it had secured the rights to carry sporting events broadcast by the Philadelphia Phillies Baseball Network, Raystay had refused to honor WLYH-TV's request for network nonduplication protection against Station WTAF-TV (Ind., Channel 29), Philadelphia, Pennsylvania. WLYH-TV asked that Raystay be ordered to show why it should not be required to give WLYH-TV nonduplication protection. WLYH-TV also requested that a forfeiture proceeding be initiated against Raystay and that a $20,000 forfeiture be imposed upon it for having knowingly and continuously violated the Commission's rules. WLYH-TV argued that it was entitled to request network nonduplication protection from Raystay, because WLYH-TV was licensed to Lancaster-Lebanon and Carlisle was in Lebanon's 55-mile zone. Raystay, however, maintained that WLYH-TV was licensed to Lancaster only, and, consequently, that it was not entitled to request network nonduplication protection. Raystay noted that, although WLYH-TV had once been licensed to Lebanon, the station's city of license was changed to Lancaster in the *Report and Order in Docket No . 14668*, 24 RR 1564 (1962). WLYH-TV, on the other hand, maintained that *Docket No . 14668* had, in fact, made Lancaster an *additional* city of license for the station. [3]

4. The Chief of the Video Services Division, Mass Media Bureau, acting under delegated authority, dismissed WLYH-TV's petition, ruling that, since the station was licensed to Lancaster only, it had no standing to request network nonduplication protection from Raystay. It was further noted that a television broadcast station, in contrast to an AM or FM radio station, could not be licensed to more than one community or subdivision simultaneously, citing Section 73.1120 of the Commission's Rules.

5. In support of its application for review, WLYH-TV argues that it is licensed to Lebanon and Lancaster concurrently, citing *Docket No . 14668, supra*. WLYH-TV maintains that since 1962, it has relied upon this case as proof of its dual licensing status, and that it has consistently promoted itself as a Lancaster-Lebanon station, with a studio in each city. WLYH-TV further claims that no licensee of WLYH-TV ever received notice of any Commission decision to delete Channel 15 from the Lancaster-Lebanon assignment. [4]In support of this contention, WLYH-TV states that, although the dual assignment was absent from the Table of Assignments resulting from the decision in *Fourth Report and Order in Docket No . 14229*, 5 RR 2d 1587 (1965), the item that initiated the proceeding, *Further Notice of Proposed Rulemaking in Docket No . 14229*, 28 Fed. Reg. 11738 (1963), had listed the dual assignment without comment. WLYH-TV therefore maintains that the subsequent omission of the dual assignment was due to a typographical error and of no binding effect. WLYH-TV further alleges that the 1979 rulemaking promulgating Section 73.1120 of the Rules, *Regulations and Rules Oversight of the AM , FM and TV Broadcast Rules*, 44 Fed. Reg. 69934 (1979), failed to give prior notice of the Commission's intention to add a clause restricting TV broadcast stations to a single city of license and, consequently, that the rule should not be applied retroactively. WLYH-TV argues that although the rule may restrict a television station to a single city of license, prior Commission policy did permit dual licensing.

6. In opposition, Raystay argues that WLYH-TV confuses the Commission's allocation process with its licensing process. Station allocation, states Raystay, is made through the rulemaking process, while licensing is determined through the Commission's application procedure. Therefore, argues Raystay, even if the TV Table of Assignments did at one time list Channel 15 as assigned to two cities, the dual allocation did not mean that WLYH-TV had ever been *licensed* to both cities concurrently. Raystay maintains that at the time the Commission processed Channel 15's assignment, a television station could be licensed to a community other than the one to which its channel was allocated, pursuant to former Section

73.607(b) of the Commission's Rules, the "15-mile" rule. Raystay argues that WLYH-TV is licensed to Lancaster only, citing *Triangle Publications , Inc .* (Lancaster, Pennsylvania), 47 FCC 2d 633 (1974). Thus, contends Raystay, WLYH-TV, as a station licensed exclusively to Lancaster, lacks standing to request network nonduplication protection from it. Addressing WLYH-TV's contentions that the current Table of Assignments is defective due to a typographical error, Raystay argues that the station has had twenty years to seek any necessary correction of an alleged error. At any rate, says Raystay, the omission of Lebanon from the Channel 15 assignment is probably due to the Commission's opinion that the Lebanon allocation was superfluous, since WLYH-TV was licensed to Lancaster only.

7. We find WLYH-TV's arguments unpersuasive. WLYH-TV is licensed solely to Lancaster, Pennsylvania. Although prior to the decision in *Docket No . 14668, supra,* the station had been licensed to Lebanon, it has never been licensed to two cities simultaneously. Contrary *to WLYH-TV's contentions, Docket No . 14668, supra,* did not add Lancaster as an additional city of license for WLYH-TV, but rather deleted Lebanon and replaced it with Lancaster as the *sole* city of license for the station. As we stated therein, "It is further ordered, that the license.for Station WLYH-TV is modified to specify station location at Lancaster, Pennsylvania *instead of* Lebanon, Pennsylvania" 24 RR at 1567. [Emphasis added.] That "WLYH-TV is not licensed to the city of Lebanon," but rather to Lancaster, and that no television station at all is licensed to Lebanon, was further noted by the Commission in its decision in *Triangle Publications , Inc .*, 47 FCC 2d at 634. This is also verified by the station's own records on file with the Commission. [5] The other cases cited by WLYH-TV in support of its dual-licensing argument are only relevant herein to the extent that they exemplify WLYH-TV's failure to comprehend the difference between the allocation of a channel and the licensing of a television broadcast station. [6] Although a channel may be allocated to more than one community at a time on the Table of Assignments, pursuant to Section 73.606(b) of the Rules, applicants for such channels must elect which of the communities listed in the Table they wish to be licensed to serve. No television station may be licensed to more than one community at a time, pursuant to Section 73.1120(b) of the Commission's Rules.

8. Lancaster is in the Harrisburg-Lancaster-York, Pennsylvania, Major Television Market. Since Lancaster's 35-mile specified zone does not encompass Carlisle, WLYH-TV has no network nonduplication rights on Raystay's system. Accordingly, we find no error in the dismissal of WLYH-TV's petition.

9. In view of the foregoing, we find that grant of WLYH-TV's "Application for Review" is not in the public interest.

10. Accordingly, IT IS ORDERED, That the Application for Review filed by Gateway Communications, Inc., IS DENIED.

11. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion shall be sent by Certified Mail--Return Receipt Requested to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1]WLYH-TV filed a reply to Raystay's opposition. This pleading was not requested by the Commission, and will not be considered, pursuant to Section 1.115(f) of the Commission's Rules.

[2]Lancaster is in the Harrisburg-Lancaster-York, Pennsylvania, Major Television Market (#57).

[3]The parties also disagreed whether Channel 15 was *assigned* to Lancaster or to Lancaster-Lebanon, pursuant to Section 73.606(b) of the Commission's Rules. Raystay noted that although *Docket No . 14668, supra,* had expanded Channel 15's assignment from Lebanon alone to Lancaster-Lebanon, the Commission three years later deleted Lebanon from the Channel 15 assignment. Gateway, however, maintained that the subsequent omission of Lebanon was due to a typographical error and that the Lancaster-Lebanon assignment established in *Docket No . 14668, supra,* remained in effect.

[4]Until 1972, the licensee of WLYH-TV was Triangle Publications, Inc. (hereinafter "Triangle"), which acquired the station in 1957.

[5]In April 1981, while the station was still licensed to Lebanon, the Commission granted Triangle a waiver of former Section 3.652(a) of the Commission's Rules to permit the station to identify itself on the air as a Lebanon-Lancaster station. The Commission's letter to the licensee stated, however, that "this action does *not* modify your license, change the station location as specified in your license, or change your obligations to your principal city, Lebanon, in any way." Furthermore, following the decision in *Docket No . 14668, supra,* all copies of the station's successive licenses on file with the Commission have shown Lancaster as the station's one and only city of license.

[6]In the *Report and Order in Docket N o. 11160 , 15 RR 1613 (1957),* we simply noted that the Congress, as reflected in the legislative history of Section 307(b) of the Communications Act of 1934, did not preclude the Commission from issuing multiple-community licenses if it chose to do so. Both the *Report and Order in Docket No. 19075, 23 RR 2d 1665 (1972), and the Report and Order in Docket No. 20781, 44 RR 2d 457 (1978),* also relied upon by WLYH-TV, addressed questions of channel allocation, not licensing of facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure — CC Docket No. 78-72

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — CC Docket No. 80-286

Order

Adopted: October 7, 1986 **Released: October 15, 1986**

By the Commission:

1. On September 23, 1986, the National Association of Regulatory Utility Commissioners, pursuant to Section 410(c) of the Communications Act,[1] nominated The Honorable George H. Barbour, Commissioner on the New Jersey Board of Public Utilities, to serve as a member of the Joint Board in CC Docket 80-286.[2] A vacancy on the Joint Board has occurred as a result of the death of The Honorable Edward P. Larkin of New York.

2. We accept the nomination by the National Association of Regulatory Utility Commissioners and, pursuant to Section 410(c) of the Communications Act, hereby appoint the following State commissioner to serve as a member of the Joint Board established in CC Docket 80-286 in lieu of the late Edward P. Larkin:

The Honorable George H. Barbour
Commissioner
New Jersey Board of Public Utilities
1100 Raymond Boulevard
Newark, New Jersey 07102
(201) 648-3733

3. Accordingly, IT IS ORDERED that The Honorable George H. Barbour shall serve on the Joint Board in CC Docket 80-286.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] 47 U.S.C. § 410 (c) (1985).

[2] *See* letter from Paul Rodgers, Administrative Director, National Association of Regulatory Utility Commissioners, to Mark S. Fowler, Chairman, Federal Communications Commission, dated September 23, 1986.

Before the
Federal Communications Commission
Washington,D.C.2O554

MM DOCKET NO. 85-269

In re Applications of

OPAL CHADWELL File No. BPCT-850103KK

DOROTHY O. SCHULZE AND DEBORAH BRIGHAM, A GENERAL PARTNERSHIP File No. BPCT-850320KG

BLANCO COMMIUNICATION, LTD. File No. BPCT-850320LC

For Construction Permit
for a New Television station
Blanco, Texas

Appearances

Francis E. Fletcher, Jr., Lynn M. Clancy and Michael L. Glaser on behalf of Opal Chadwell; *Donald E. Martin* on behalf of Dorothy O. Schulze and Deborah Brigham, a General Partnership; *A. Wray Fitch, Diane Ming* and *James Gammon* on behalf of Blanco Communications, Ltd.;, *Rebecca Dorch* and *Richard H. Waysdorf* on behalf of Balcones Broadcasting Co.; [1] and *Arthur I. Steinberg* and *Linda R. Figueroa* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

WALTER C. MILLER

Issued: October 6, 1986; Released: October 22, 1986

1. This is the Channel 52 Blanco, Texas UHF proceeding. Three applicants remain: Opal Chadwell (Chadwell); Dorothy O. Schulze and Deborah Brigham, a General Partnership (Schulze and Brigham); and Blanco Communications, Ltd. (BCL). The Chief, Video services Division designated the case for hearing on August 30, 1985. See 50 F.R. 36143 published september 5, 1985.

2. In addition to the issues the Chief designated, the issues in this case had to be enlarged on four separate occasions: (1) FCC 85M-4583, released November 22, 1985; (2) FCC 85M-4590, released November 22, 1985; (3) FCC 86M-293 released January 23, 1986; and (4) FCC 86M-879, released March 6, 1986. [2] Thus it was necessary to hold the hearing in this case in three phases.

3. After the interlocutory cycle had run its course, the following issues had to be resolved: [3]

(1) To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation;

(2) To determine whether Opal Chadwell misrepresented the facts or lacked candor when she represented to the Commission in her original application that the land at NL 30 degrees 01'58" WL 98 degrees 18'11" was available to her to use as a transmitter site, and, if so, what effect those misrepresentations or lack of candor has on her basic qualifications to be a Commission licensee; [4]

(3) To determine whether BCL principal Sidney Paul DuBose has made or caused to be made misrepresentations to or lacked candor with the Commission in pleadings filed in this proceeding on October 7, November 1, and November 6, 1985, and, if so, what effect those misrepresentations or lack of candor has on BCL's basic qualifications to be a Commission licensee; [4]

(4) To determine whether Schulze and Brigham have violated 47 CFR 1.65 by failing to keep the information in its application accurate and complete or by failing to report substantial changes which may be of decisional significance, and, if so, what effect those failures have on Schulze and Brigham's basic qualifications to be a Commission licensee; [4]

(5) To determine whether Schulze and Brigham misrepresented or lacked candor when it reported the other broadcast ownership interests of Dorothy O. Schulze, and, if so, what effect that has on Schulze and Brigham's basic qualifications to be a Commission licensee; [4]

(6) To determine whether Dorothy 0. Schulze lacked candor in her *Castle Rock* application regarding the availability of her proposed antenna site, and if so, what effect that lack of candor has on her basic qualifications to be a Commission licensee;,

(7) To determine which of the proposals would, on a comparative basis, best serve the public interest; [5] and

(8) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

On Issue 2 the burden of proceeding was placed on BCL, while the burden of proof remained with Opal Chadwell. On Issues 3, 4, 5, and 6, the burden of proceeding was placed on Opal Chadwell while the burden of proof remained on BCL for Issue 3, and on Schulze and Brigham for Issues 4, 5, and 6.

4. We held the prehearing conference on November 27, 1985, the Evidentiary Admission Session on December 10, 1985, the Phase 1 hearings on January 6 and 7, 1986, the Phase 2 hearings on February 24-26, 1986, and the Phase 3 hearings on May 5, and June 5-6, 1986. The evidentiary record was closed on June 6, 1986. See FCC 86M-1911, released June 10, 1986.

5. All three applicants and the Bureau filed their first set of Proposed Findings of Fact and Conclusions of Law on April 11, 1986. Schulze and Brigham *supplemented* that first set of findings on April 14, 1986. The three applicants filed their first set of Replies on April 21, 1986. All three filed their second set of Proposed Findings of Fact and Conclusions of Law on July 3, 1986. Chadwell and Schulze and Brigham filed their second set of Replies on July 11, 1986, and Schulze and Brigham *supplemented* that second set on July 14, 1986. [6] BCL indicated that it wasn't filing a second set of Replies.

Findings of Fact
Issue 1 - Air Hazard Issue

6. All three applicants have met the air hazard issue that has been designated against them. The FAA has determined that each applicant's proposed tower would not have an adverse effect on the safe and efficient use of

navigable air space or on the operation of air navigation facilities. See Chadwell Exhibit Pll-13; BCL Exhibit 4, Schulze and Brigham Exhibit 7; FCC 86M-880, released March 6, 1986; FCC 86M-1224, released April 10, 1986; and FCC 86M-1434, released April 28, 1986. So the air hazard issue will play no role in the outcome of this case.

Issues 2-3 - The Chadwell and DuBose Misrepresentation Issues

7. *Background.* The genesis of these two issues can be found in a Petition to Enlarge Issues that BCL fired at Chadwell on October 7, 1985. BCL accused Chadwell of misrepresenting to the Commission that her original transmitter site was available to her when it wasn't. Chadwell replied that her original erroneous site specification was the combination of an innocent error and BCL principal Sidney Paul DuBose's duplicity. She claimed that DuBose had falsely led her to believe that he owned the land where she proposed her transmitter and that the land was available for her use.

8. Dubose denied that. He says he told Chadwell that he would make his land available to her if she included him as a partner in her application. Moreover, he says he never represented to her that he owned the land where she proposed to locate her original transmitter; i.e., the land at North Latitude 30 degrees 01'58", West Longitude 98 degrees 18'11".

9. Because of the several serious and direct conflicts in the pleading representations made by Chadwell, on the one hand, and Sidney DuBose on the other, the Presiding Officer added a misrepresentation issue against each of them, ordered them both to present direct testimony on those issues, and called on them both to personally testify so he could observe their demeanor.

10. *Demeanor Findings.* Having observed the demeanor of Mrs. Chadwell and Mr. DuBose, the Presiding Officer has selected Opal Chadwell's version of the facts. See *Substantive Findings, infra.* She has factually detailed the events underlying the conflict. Her testimony is basically consistent and corroborated by her husband's sworn testimony.[7] There is no reason for not crediting her version of the past events. On the other hand, the Presiding Officer wasn't favorably impressed with Sidney Paul DuBose's testimony. His answers didn't fit together. He was weak on details, and his sense of recall was incredibly poor (See Tr. 796, 797, 798-799, 802, 807, 809, 811, 815, 816, 819-820, 821-822, 823, 824-825, 833 and 834). In fact, at the hearing, once additional details about other Chadwell/DuBose meetings were brought out, the Presiding Officer got the distinct impression that DuBose was stringing Mrs. Chadwell along; i.e., he was pretending to be favorably considering letting Mrs. Chadwell use what she thought was his land for a transmitter so he'd have time to prepare and file a competing application. But he knew all along that she had specified coordinates that wasn't his land.

11. *Substantive Findings.* Opal Chadwell petitioned for rule-making to have Channel 52 allocated to Blanco. Shortly after that rulemaking was granted she started to take concrete steps to file a Channel 52 application. First she retained legal counsel, and then a consulting engineer to assist her. She was advised to first obtain a transmitter site. Legal counsel told her that she had to obtain a reasonable assurance" that her proposed transmitter site was available; that such assurance meant unequivocal permission from the owner of the proposed site to use it as a transmitter site; and that she should obtain such permission in writing, although it wasn't necessary to obtain an option, or lease or purchase agreement. Counsel further told her that a letter granting permission was sufficient.

12. In October 1984, Mrs. Chadwell began looking for a transmitter site. She obtained a map of Blanco and Comal county. She examined several sites, two of which she had analyzed by her engineer. Finally she decided to locate her transmitter at 30 degrees 01'58" NL, 98 degrees 18'11" WL. She asked her husband, Earl Chadwell, who was more familiar with the area than she was, who owned the land in question. Earl Chadwell said he thought the site was owned by Sidney Paul DuBose. However, Mr. Chadwell said he would confirm his belief by talking with Celestino Romero, who has been a ranch hand on the DuBose ranch for over thirty years. [8] Romero agreed that the land in question was owned by Sidney Paul Dubose. As it turned out both Earl Chadwell, and Celestino Romero were wrong, but Opal Chadwell didn't know that.

13. So late in October 1984, Chadwell, via Celestino Romero, contacted Mr. DuBose about the possibility of using DuBose's land for a tower site. Later in October or early November 1984, DuBose went to Mrs. Chadwell's office in Blanco to discuss the matter.

14. During the meeting DuBose said that he would make the land available to her if Mrs. Chadwell would include him as a partner in the application. Chadwell signified a willingness to consider DuBose's proposal, but indicated that she would like to use his site in any event. So she specifically asked him for a letter that assured her she could use the site. DuBose told her that he couldn't give her a letter that day, that he was in a hurry to leave town, but that there was plenty of time to do that. [9]

15. During this first meeting the specific emgineering aspects of Chadwell's application were also discussed. Chadwell described her proposed facilities, the general height of the tower, and the station's proposed coverage. As DuBose was leaving the office Mrs. Chadwell showed him the map of Blanco and Comal counties. See Finding 12 *supra.* It was one of four maps on the walls of the Blanco Cablevision Corporation office. [10] She pointed to the location on the map that she believed was his land, and which she intended to use as her transmitter site. She asked DuBose if this was his land and if she could use it, DuBose nodded affirmatively. [11]

16. Later Chadwell and DuBose met several times and talked about his becoming a partner. Each time they met Chadwell would ask DuBose to give her a "reasonable assurance" letter. Each time DuBose would evade the date when he would write the letter, but would always assure Chadwell that there was plenty of time for that. Accordingly, and based on DuBose's verbal assurances, Mrs. Chadwell instructed her consulting engineer, via counsel, to prepare the engineering portion of her application using what she erroneously believed was Mr. DuBose's land as her transmitter site.

17. Chadwell filed her Channel 52 application with the Commission on January 3, 1985. She specified a transmitter site at the coordinates she thought was owned by DuBose. After her application was filed she and Sidney DuBose continued to talk. But they were unable to agree on the terms of DuBose's participation. At this time DuBose knew that Chadwell's application specified transmitter land she believed he owned. [12] During one of these conversations DuBose requested, and Mrs. Chadwell gave him a copy of the engineering portion of her application. DuBose, in turn, gave Chadwell's engineering to a com-

munications expert he knew, Lowery Mays. Mays thoroughly analyzed Chadwell's engineering and discussed it with both DuBose and PittMan and with Mr. and Mrs. Chadwell [13] (Tr. 935, 943-950).

18. On February 14, 1985, Chadwell's counsel told her that the Commission had accepted her application for filing, and that any competing applications had to be filed on or before March 20, 1985. Cn or about the day before March 20, 1985, DuBose visited Chadwell's office. They discussed her application, and just before he left, he stopped in front of the map of Blanco and Comal counties she had posted on the wall. He commented that he wasn't sure that the site she had specified in her application was on his property. But he didn't tell her he was filing a competing application. She was surprised by his remark but gave it no further thought at that time.

19. Several days later her counsel told her that DuBose, Benjamin Franklin Pittman, and Gracia Romero (Celestino Romero's wife) had formed a limited partnership and had filed a competing application for Channel 52. Chadwell immediately contacted DuBose. She asked him, if even though he had filed a competing application, would he still allow her to use his land for a transmitter site. DuBose said he didn't know, he would have to ask his partner, Mr. Pittman, and get back to her. Several days passed. Chadwell tried to contact DuBose, but couldn't reach him. She left word for him to return her call. He never did.

20. So Chadwell contacted her counsel and told him what had happened. She also told him about DuBose's casual remark about not being sure he owned the land Mrs. Chadwell had specified. Counsel advised her to get a new site. He said that since the site was apparently short-spaced to one of the Channel 54 applicants in Austin, that since DuBose, despite his verbal assurances, had never provided her with the written permission to use his land for a site, that since DuBose had subsequently hinted that he didn't own the land she had specified, and that since he was now the moving force in a competing applicant, she would do well to spend her time and money on obtaining a new non-short-spaced transmitter site. She did. She specified this new site on May 6, 1985; i.e., NL 29 degrees 59'06", WL 98 degrees 22'23". She has assurance she can use this site.

21. *Intermediate Findings.* The two character (misrepresentation) issues had to be added to this proceeding because either Opal Chadwell or Sidney Paul DuBose was lying about events that led Chadwell to originally specify the land at NL 30 degrees 01'58', WL 98 degrees 18'11'. Their two versions about what had transpired directly conflicted on too many points, and since each had sworn to the Commission that their version of the facts was correct, a misrepresentation issue had to be specified against each one.

22. After observing the demeanor of the testifying witnesses, and after hearing all the facts and circumstances surrounding the conflict, it is found that Opal Chadwell has been a truthful witness, while Sidney Paul DuBose has dissembled. Admittedly Mrs. Chadwell mistakenly specified an erroneous set of site coordinates; she specified coordinates for a site she mistakenly thought was Mr. DuBose's land. DuBose knew early-on that Mrs. Chadwell had erred. But he let her believe she had specified his land, and he verbally assured her she could use that land. He deliberately led her on until he could get a competing applicant organized, and a competing application prepared and filed. Then, via a Motion to Enlarge, he tried to use Mrs. Chadwell's mistake against her.

23. So it is found that Sidney Paul DuBose lied when he swore that: "...I was not asked to provide a letter stating Ms. Chadwell could use my property. At no time did I indicate I would provide such letter, nor did I give oral assurance my property could be used ... Ms. Chadwell did not point to a location on a map at her office and ask if a site was on my ranch and if she could use that site to construct a tower. I never, therefore affirmatively nodded that the site she allegedly pointed to on the map was located on my property or that Ms. Chadwell could use it..."

24. It is further found that Sidney Paul DuBose lied when he swore that "[m]ore significantly, I never gave verbal affirmation that Ms. Chadwell could use my ranch for her tower. Ms. Chadwell never asked for, nor did I ever agree, to provide a letter indicating she could use my ranch ... At no time after Ms. Chadwell filed her application did I know that she had specified a site she thought was on my property..."

25. Thus, Issue 2 must be resolved in Mrs. Chadwell's favor. She has neither misrepresented facts, nor lacked candor with the Commission. She is basically qualified to be a Commission licensee, and therefore eligible for comparative consideration.

26. Conversely, Issue 3 must be resolved against BCL principal, Sidney Paul DuBose. He has misrepresented the facts and lacked candor with the Commission in pleadings he has filed. Such misrepresentations and lack of candor show him to be both untrustworthy and unreliable. Accordingly, BCL is not basically qualified to be a Commission licensee, and not eligible for comparative consideration.

Issues 4-5 - Schulze and Brigham's 1.65 and Misrepresentation Issues

27. *The San Antonio Filing.* Issues 4 and 5 were originally added to this proceeding when it was discovered that Dorothy Schulze was filing for more than one TV station in the San Antonio market under two different names and without reporting that fact to the Commission. See FCC 85M-4583 released November 22, 1985. [14]

28. On November 29, 1984, the Salinas-Oatman Corp. filed for Channel 60 in San Antonio, Texas (BPCT-841129LF). A pertinent part of that application reads:

> "It is intended that Salinas-Oatman Corp. will authorize an issue of non-voting stock, eighty percent of which will be issued to Dorothy Ozan. That agreement has not been reduced to writing, but such agreement will provide that the non-voting issue will not have any contingent voting rights."

29. On March 20, 1985, while the Salinas-Oatman application was still pending, [15] *Dorothy O. Schulze* and Deborah Brigham filed the instant application for Channel 52 in Blanco (BPCT-850320KG). Dorothy Schulze never mentioned that she had already applied for Channel 60 in San Antonio under her maiden name some four months earlier. Nor did she ever amend the San Antonio application to reflect that she had applied for Channel 52 in Blanco.

30. Schulze and Brigham claim that the whole episode is a big mistake. Schulze proffered a statement where she says she had discussions with Gloria Salinas-Oatman in

the fall of 1984 about the possibility of acquiring an interest in the Channel 60 application, but after considering the matter, she advised Ms. Salinas-Oatman that she had decided not to acquire such an interest. Schulze says she didn't know, until Chadwell raised the matter (Footnote 14 *supra.),* that Ms. Salinas-Oatman had referred to her in the San Antonio application, or that she had referred to her by her maiden name, Dorothy Ozan.

31. Gloria Salinas-Oatman proffered a statement to the same effect. She said that it was she who drafted the language that appeared in the Channel 60 application (Finding 28 *supra.).* Ms. Salinas-Oatman explained why she drafted that portion of the application as she did. She said:

> "Ms. Schulze's maiden name was Dorothy Ozan. I had known her by that name since childhood. Thus, I naturally and inadvertently referred to her by that name in the Salinas-Oatman application, although her name now is Dorothy Schulze. [16] ...To the best of my knowledge and belief, Ms. Schulze did not know until recently that I had referred to her in the Salinas-Oatman application as Dorothy Ozan."

32. At the hearing both Ms. Schulze and Ms. Salinas-Oatman elaborated on their previous representations (Findings 30-31 *supra.).* It was then that their stories became unglued. Dorothy Schulze testified that she became aware of Channel 60's availability through her brother, Richard Ozan. She says that she contemplated participating in the San Antonio application; that she never pursued it because of her involvement in Blanco, Texas; and that she advised Ms. Salinas-Oatman that she was no longer interested. Ms. Salinas-Oatman says that Schulze asked to withdraw from the application sometime around December 31, 1984. [17]

33. Ms. Salinas-Oatman testified that she learned about Channel 60's availability from Dorothy Schulze. She says that Schulze also referred her to Tom Root, a Washington, D.C. attorney. Salinas-Oatman isn't sure how she initially contacted Root, but she says that he called her a few times, and she called him a few times. She describes her application as being a collaboration between herself and Root. He sent an application to her just prior to the filing deadline, but she says she never paid Root.

34. Ms. Salinas-Oatman further swears that she never conferred with Root or Schulze about the application provision that would issue non-voting stock to Dorothy Ozan. At the hearing she continued to swear that she was the one who wrote that provision. She continued to assert that she used Dorothy "Ozan" instead of Dorothy "Schulze" out of habit. She says she included Ms. Schulze in the application because she thought that non-voting stock in the hands of a female would help her application. [18]

35. Even before we look at the contradictory testimony of other witnesses; i.e., Tom Root, Ron Baptist, and Richard Ozan, an intermediate finding is warranted that Salinas-Oatman's and Schulze's testimony on these issues is not credible. It strains credulity to believe that a principal (Salinas-Oatman) would dispose of an 80% equity interest in an application without discussing the matter with the beneficiary of that generosity, and without the beneficiary (Ms. Schulze) realizing she was involved.

36. Next, it strains credulity to believe that one totally unfamiliar with the Commission's processes, and who had Washington counsel available would draft an application provision to issue nonvoting stock without conferring with that counsel. It further strains credulity to believe that Salinas-Oatman felt that she would be advantaged by including Ms. Schulze in her ownership structure (See Footnote 18 *supra.).* And finally it strains credulity to believe that Gloria Salinas-Oatman referred to Dorothy "Schulze" as Dorothy "Ozan" out of habit. For the last 14 years Dorothy "Schulze" has been known as Dorothy "Schulze," and Ms. Salinas-Oatman has known her by that name. So a finding is warranted that the Schulze/Salinas-Oatman version of Dorothy Schulze's participation in the Channel 60 San Antonio application is inherently incredible.

37. Moreover, Schulze's testimony contradicts Salinas-Oatman. Schulze swears that *neither* she nor Salinas-Oatman were responsible for the stock provision language in the Channel 60 application (Finding 28 *supra.).* When asked how she knew that Ms. Salinas-Oatman hadn't drafted that language, she said that Salinas-Oatman had told her she (Salinas-Oatman) hadn't drafted the language. On the other hand, Salinas-Oatman has continued to assert that she drafted the stock provision language.

38. Schulze also claims that she didn't know she was named in the San Antonio application until Chadwell filed her Petition to Enlarge in the Blanco proceeding (Footnote 14 *supra.).* But Gloria Salinas-Oatman swears that Schulze must have known since she (Schulze) purportedly asked to withdraw from the application sometime around December 31, 1984.

39. Any doubts about the lack of truth and veracity in the Schulze/Salinas-Oatman story were laid to rest after three other witnesses testified; i.e., Tom Root (the attorney who prepared the Channel 60 application), Ron Baptist (a communications consultant who sells his services off of Commission "cut-off" lists), and Richard Ozan (Dorothy Schulze's brother), and certain relevant contemporaneous documents were introduced into evidence. Their testimony contradicts that given by Ms. Schulze and Salinas-Oatman.

40. Here's the facts underlying the filing of the Salinas-Oatman application for Channel 60, San Antonio. In the fall of 1984, Root, Baptist, and Richard Ozan got together for lunch at Blackie's in Washington, D.C. Among other things, they discussed the filing of TV applications in various markets. A short time later Richard Ozan contacted Ron Baptist by phone, and indicated that he was interested in filing some broadcast applications. Baptist finds people interested in filing for CPs with the FCC, and, for a fee, arranges to have an attorney and an engineer prepare the applications. Invariably, Baptist obtains the services of Tom Root, an attorney, to prepare the applications.

41. Baptist sells his services off of the Commission "cut-off" lists. When a list of filing deadlines was released, Baptist would call Ozan and either describe what was available or send him a copy of the list. Ozan indicated, *inter alia,* that he wanted to apply for San Antonio and Conroe, Texas. [19] [20] Baptist, in turn, relayed that request to Root.

42. Before the San Antonio and Conroe applications were filed Richard Ozan and Ron Baptist recognized that it would be tough for Mr. Ozan to obtain any construction permits since he was a white, nonhispanic male. So Mr. Ozan tried to find local, minority females to list on the Conroe, San Antonio, and later applications as the applicant. When he could, Mr. Baptist would assist Mr. Ozan in locating a suitable individual (e.g. Irene Wagner for the Tolleson, Arizona application, and Dorothy Evans for the

Memphis, Tennessee application). When neither could find "an applicant," Mr. Ozan said that he "would just use one of [his] sisters on that app[lication]" (Tr. 2210).

43. On November 7, 1984, Root sent Richard Ozan a letter. It contained instructions and advice, and enclosed blank FCC 301 Forms to be completed for the San Antonio and Conroe applications. In addition, Root included a form he uses to get biographical information from clients. During this period immediately preceding the filings for Conroe and San Antonio, Root was also in touch with Ron Baptist and Richard Ozan by telephone. [21] The information Root used to prepare those applications came from Richard Ozan. It was Richard Ozan who told Root to insert language in the San Antonio application about an agreement to issue nonvoting stock to Dorothy Ozan (See Finding 28 *supra.*).

44. Root filed the Conroe and San Antonio applications on November 29, 1984, and after he had filed them he sent copies to Richard Ozan. Since Mr. Ozan was the gentleman who had ordered the work, Root looked to Ozan and Baptist for payment. However, when he pressed Ozan for payment he received two $1,000 checks, one from Dorothy Schulze for the San Antonio application, and one from another one of Ozan's sisters, Elizabeth Anderson, for the Conroe application. Root never received a check from Gloria Salinas-Oatman or the Salinas-Oatman corporation for the San Antonio filing, and he never talked to either Gloria Salinas-Oatman or Dorothy Schulze before he filed the application.

45. *San Antonio Intermediate Findings.* Dorothy Schulze's claim that she has never had any interest in the Salinas-Oatman Channel 60 application must be rejected. It is a pure fabrication. The face of the application shows that she agreed to subscribe to 80% of the non-voting stocking the Salinas-Oatman corporation under her maiden name, Dorothy Ozan. See Finding 28 *supra.* Attorney Tom Root says he inserted the non-voting stock agreement language in the San Antonio application pursuant to instructions he received from Dorothy Schulze's brother, Richard Ozan. In November 1984, Dorothy Schulze sent Root a $1,000 check for his work on the San Antonio application. [22] Even Schulze's own brother, Richard Ozan, testified that Dorothy Schulze was to be a non-voting stockholder in the San Antonio application. [23]

46. Accordingly, the intermediate findings are warranted that Schulze and Brigham [24] have violated 47 CFR 1.65; that they have deliberately failed to keep the information in their Blanco application accurate and complete; that they have failed to report substantial changes of decisional significance; and that most importantly, when confronted with those 1.65 violations, Ms. Schulze dissembled. She lied about the extent of her participation in the San Antonio Channel 60 application. So it is found that Schulze and Brigham is not basically qualified to be a Commission licensee.

47. *The Conroe, Texas Filings.* On the cut-off date of February 15, 1985, Dorothy O. Schulze purportedly [25] filed an application for the Denver market; i.e., for Channel 53, in Castle Rock, Colorado. [26] On July 24, 1985, the Presiding Officer called on all the applicants to, *inter alia,* update their mass media holdings. See *Castle Rock Communications, Ltd.* FCC 85M-2530.

48. On August 14, 1985, via her new counsel (Donald Martin), Ms. Schulze purportedly complied with that directive. She *volunteered* an amendment that contained the following two representations.:

> "Dorothy 0. Schulze is a subscriber to 80% of the nonvoting stock (sic) the G-A Corporation, applicant for authority to construct a new commercial television station on Channel 55 at Conroe, Texas (File No. BPCT-841129LE).
>
> Elizabeth Anderson is a sister of Dorothy O. Schulze. She owns 100% of the voting stock of the G-A Corporation, the applicant mentioned ... above."

49. Having no reason to question Schulze's voluntary representations, her unopposed amendment was granted. See *Castle Rock Communications, Ltd.,* FCC 85M-3387, released August 29, 1985. Subsequently, on January 6, 1986, Dorothy Schulze testified in this, the *Blanco,* proceeding. At Tr. 432-433, Chadwell's counsel asked Schulze this question, and, under oath, she gave this answer:

> "Q. Have you ever been involved in an application for Conroe, Texas?
>
> A. No."

50. Based on Schulze's two diametrically opposed representations, Chadwell moved to enlarge the scope of Issues 4-5. Schulze again relied on the defense of mistake. She said that at the time she filed her *Castle Rock* amendment "...I was in the process of changing attorneys with respect to the Castle Rock application. The amendment was prepared by my counsel [Donald Martin] with information provided to him by the office of my former counsel [Tom Root]. When I reviewed this amendment, I inadvertently overlooked the reference to the Conroe application..."

51. The Presiding Officer enlarged the scope of the issues. In so doing he questioned the spurious defense of mistake. He said: "It is both illogical and incomplete. It isn't enough to say that her *Castle Rock* amendment was prepared by Don Martin based on information he obtained from Tom Root ... that only begs the question. Where did Root obtain the information? [27] Is it any less accurate because the facts were passed from one lawyer to another? And why did she proffer data about her sister, Elizabeth Anderson, in her *Castle Rock* amendment? Is that accurate? [28]..." See FCC 86M-879, released March 6, 1986.

52. In an effort to explain the circumstances surrounding the filing of the *Conroe* application, Schulze and Brigham presented the testimony of JoAnn Garcia (G-A's President and the purported owner of 100% of its voting stock), and Schulze's sister, Elizabeth Anderson (the purported owner of 80% of G-A's non-voting stock). [29]

53. According to Ms. Garcia she initiated and was the primary mover behind the Conroe application; she initiated the process of filing the application by contacting the FCC directly for information; the FCC sent her the application forms and she then contacted Elizabeth Anderson about becoming involved in the application; and she then personally hired attorney, Tom Root, to prepare the application.

54. Ms. Garcia says that the only role Richard Ozan played in the Conroe application is that occasionally Ms. Anderson would consult her brother for some advice. [30] She further testified that she (Ms. Garcia) personally dealt with Mr. Root in preparing the application; that she completed a draft application which she sent to Mr. Root; and that it was she that ulimately fired Root.

55. JoAnn Garcia's testimony regarding the circumstances underlying the filing of the Conroe application must be rejected as sheer fabrication. It has been completely discredited by the testimony of Root, Ozan, and Baptist (See Findings 40-44 *supra.*). Root never talked

with Ms. Garcia before he filed the Conroe application. He got all his information from Richard Ozan. Both Ozan and Ron Baptist confirm Root's testimony. They both include the Conroe application as one that Root prepared at Richard Ozan's behest.

56. Ms. Garcia swears that the "G-A" in G-A Communications, Inc. stands for the first and last letters in "Garcia." Root says that "G-A" stands for "Garcia-Anderson", and came from Richard Ozan.

57. Ms. Garcia says she discussed errors in the application with Root before it was filed, including the erroneous name given the applicant at various points. Root says he never spoke to JoAnn Garcia before the Conroe application was filed, and more specifically that he never discussed with her the errors in the application concerning the name of the applicant.

58. Ms. Garcia maintains that she personally asked Root to form a corporation, and that his failure to do so is one of the reasons she allegedly fired him. Richard Ozan has a somewhat different story. He says that Root told him (not Ms. Garcia) that he (Root) would form a corporation "on these applications" (Tr. 2110). Root, however, swears he was never asked by Ms. Garcia or anyone else to incorporate G-A Communications. Root says he is not familiar with Texas corporate law and therefore wouldn't attempt to form a Texas Corporation. In support he produced a letter he wrote to Richard Ozan dated November 7, 1984. There he instructed Mr. Ozan to form the corporations for both the Conroe and San Antonio corporations.

59. Ms. Garcia testified that she personally phoned Mr. Root in September or early October, 1984. Root says, and he reviewed his business records on this point, that he had no conversations with Ms. Garcia either in September or October 1984, or anytime before the Conroe application was filed. And of course, Root, Ozan, and Baptist all agree that Root was hired through Mr. Baptist to do the Conroe and San Antonio applications for Mr. Ozan.

60. Ms. Garcia says Root sent her a blank 301 application to complete. Root has no record of sending the application to Ms. Garcia, [32] and he never saw a draft application that she allegedly completed.

61. Ms. Garcia repeatedly testified that it was she who arrived at the information contained in Conroe application Exhibit II-1 after discussions with Elizabeth Anderson. She says she communicated this information to Mr. Root: "It is intended that the G-A Corporation will authorize an issue of nonvoting stock, eighty percent of which will be issued to Elizabeth Anderson. The agreement has not been reduced to writing, but such agreement will provide that the nonvoting issue will not have any contingent voting rights..." Root says that he drafted Exhibit II-1 based on his discussions with Richard Ozan about how the corporation's equity would be split and how voting control would be allocated. Tom Root's testimony on the point will be credited. [33]

62. On the question of financial certification, the Conroe application says, "The applicant shortly will be in a position to so certify." Ms. Garcia says that this language was the result of a note that she made on her handwritten draft of the Conroe application she sent to Mr. Root. But Root says he got the information from Richard Ozan. In fact, Root even went into some detail about his conversation with Mr. Ozan on the topic (Tr. 1913-1914).

63. A portion of the Conroe application also reads: "Corporation in the process of being formed." Ms. Garcia said that those words were inserted as a result of a notation she had made on her draft application, and a talk she had with Mr. Root about forming the corporation. Root says that he never had any conversations with Ms. Garcia about forming the corporation; and that it was his office that inserted that language based on a conversation with Richard Ozan about the steps Ozan hadn't taken to meet Root's November 7, 1984 letter to Ozan on the matter.

64. Ms. Garcia says she fired Tom Root in January 1985 after she became unhappy with the quality of his representation, and she hired Don Martin a few days later (Tr. 1573-1579). She gave an elaborate description of how she fired Mr. Root. Later, she changed her testimony and said she fired Root in late September or early October, 1985 (Tr. 1597). Root says he has never discussed the quality or nature of his representation with Ms. Garcia. He says he transferred cases and files to Mr. Martin after a meeting he had with Richard Ozan in May 1985. At that meeting Ozan and Root went over a list of applications Root had prepared for Ozan. Root indicated in which cases he would have a conflict and thus wouldn't be able to represent Ozan at the hearings. He recommended to Ozan that Don Martin take over the conflict cases. He transferred some of his files to Martin at that time. Later, when Ozan decided that Martin should handle all of his cases, Root transferred the remaining files.

65. Messrs. Ozan and Baptist corroborate Root's testimony about his Conroe representation. Ozan admits that he dealt with Baptist to arrange for the preparation of the applications, including the Conroe application; and that he paid for the preparation of those applications, including the Conroe application. Baptist confirmed both Root's and Ozan's testimony.

66. *Intermediate Findings - Conroe, Texas.* It is found that Dorothy Schulze misrepresented the facts to the Commission in the Castle Rock, Colorado proceeding regarding her role in the Conroe, Texas applicant. She represented she was a subscriber to 80% of G-A Corporation's non-voting stock. She wasn't. She represented that her sister, Elizabeth Anderson, owned 100% of G-A's voting stock. Ms. Anderson didn't. Dorothy Schulze has never satisfactorily explained why she *voluntarily* made such misrepresentations to the Commission. She admits she reviewed the *Castle Rock* amendment twice (once in a discussion with her counsel before the amendment was filed, and again when she read it and signed it).

67. Opal Chadwell, the only party who offers a plausible reason for Schulze's misrepresentations and 1.65 violations, says that Schulze was truly unaware of what interests the Commission's records showed she had and didn't have; that she was merely asked to sign a piece of paper for her brother, Richard Ozan, who controlled the Blanco, Castle Rock, and other applications; and that she did so.

68. Schulze tried to head off this obvious inference by presenting the testimony of JoAnn Garcia. Ms. Garcia testified that it was she, not Richard Ozan, that formulated and spearheaded the filing of the Conroe application. But Garcia's testimony turned out to be another set of fabrications in its own right. She falsely testified she had hired Tom Root to prepare the Conroe application; she falsely testified about conversations with and information she gave Root for the Conroe application; and she falsely testified that she fired him after becoming disenchanted with the quality of his legal service.

69. Not only did Tom Root contradict almost every representation Ms. Garcia made, but so did Richard Ozan (Dorothy Schulze's brother), and communications consultant, Ron Baptist corroborated Root's and Ozan's testimony. Thus, and in an effort to extricate Dorothy Schulze

from the predicament she (Schulze) had gotten into in connection with her *Castle Rock* filing, JoAnn Garcia spun out a web of lies about her (Garcia's) participation in the Conroe, Texas application. [34] Those lies must be rejected.

70. *The Overall Picure.* Both the San Antonio and Conroe filings supra.. are a part of a larger picture. This record reveals that Richard Ozan exercises or has exercised *de facto* control over ten television applications: (1) Schulze and Brigham for Blanco, Texas; (2) Salinas-Oatman Corporation for San Antonio, Texas; (3) G-A Communications, Inc. for Conroe, Texas; (4) Carter Broadcasting Partnership for Fort Worth, Texas; [35] (5) Dorothy Evans for Memphis, Tennessee; (6) Daye Corporation for Charleston, South Carolina; (7) Dorothy Schulze for Castle Rock, Colorado; (8) Schulze-Wagner Partnership for Tolleson, Arizona; (9) Faye Daye Corporation for Rock Hill, South Carolina; and (10) an applicant for Omaha, Nebraska.

71. As previously noted (Findings 40-44 *supra.)* Richard Ozan retained Ron Baptist who in turn secured the services of Tom Root. [36] Root obtained all the information for six of the ten applications from Mr. Ozan. [37] He then prepared and filed those six applications; namely, the Conroe, San Antonio, Charleston, Memphis, Castle Rock, and Tolleson applications (Tr. 2213-2214). [38]

72. In the case of the Blanco and Rock Hill applications, Baptist referred Mr. Ozan to a Mr. Ken Russell of Media Property Associates. Russell, in turn, obtained the services of Stanley Emert, an attorney, and Dwight Magnuson, an engineer to prepare and file those two applications. [39] [40]

73. Root's efforts to collect his fee for the San Antonio and Conroe applications has already been discussed. See Finding 44 *supra.*The only person Baptist ever looked to for payment or from whom he received payment was Richard Ozan. He charged Ozan $2,000 per application or $12,000. Because of a billing dispute Ozan only paid Baptist $9,000 and considered that payment in full. He paid Baptist with $7,000 check dated March 8, 1985, and a $2,000 check dated May 4, 1985 (See Chadwell Exhibits III-4 and III-25). Neither Dorothy Schulze nor Deborah Brigham ever paid Mr. Baptist.

74. When Richard Ozan was asked about these payments he, at first, only admitted to paying the bills in one case (Blanco). He even tried to minimize the importance of this payment by saying he was paying back a loan to Dorothy Schulze. However, upon further questioning Ozan conceded that he had paid for applications for individuals who were not his sister, and to whom he did not owe money, or for the entire application where individuals were paired with his sisters and where he did not even know the ownership percentages of the people involved. For example, Mr. Ozan wrote checks for at least $12,402.71 to cover the application filed for Memphis (no sisters were involved), for an application filed by Faye Daye (Dorothy Schulze had no ownership interest), for the Conroe application (Elizabeth Anderson had no equity interest when the application was filed), for the Omaha application (no sister was involved), For the San Antonio application (where Gloria Salinas-Oatman was listed as the sole stockholder, and Dorothy Schulze denies any involvement) and for the Tolleson application (where one of the principals was Irene Wagner who is not related to Ozan). He asserted that he didn't know his sisters' ownership percentages in any of the applications they were involved in. So he was unable to allocate any portion of the applications payments to the paying-back of personal loans.

75. Moreover, Mr. Ozan's loan payback story lacks credibility. He couldn't provide any details about the loan, even its basic terms. He couldn't state when the loan was made, or give its precise amount. There was nothing to document the loan. When he was asked how much he paid Ms. Schulze back he first said it was about $9,000. Later he said it was over $12,000. [41]

76. Based on the foregoing (Findings 70-75 *supra.)* certain intermediate facts are in order. Richard Ozan filed a group of ten TV applications using various females as comparative fronts. [42] That group includes the instant Blanco application. He selected the markets he wanted. He contacted a consultant, Ron Baptist, to prepare those appli- cations. He paid Baptist for his work. On those applications where he didn't use Baptist and Root, Mr. Ozan used Media Property Associates. He paid them $3,300 to prepare and file the Blanco and Rock Hill applications. He dealt personally with the attorney, Tom Root, who prepared the majority of the applications. He provided Root with the information that was needed to complete those applications. In short he was the "moving force" behind, and in *de facto* control of those applications. Yet he was never named as a principal in any of them. This is a multiple 47 CFR 1.65 violation of serious magnitude. Moreover, Schulze and Brigham have tried to hide that 1.65 violation by misrepresenting the facts to the Commission.

77. In addition, Schulze and Brigham continued to misrepresent the facts during the discovery phase of expanded Issues 4 and 5. When asked about her Fort Worth application, Dorothy Schulze swore that she and Martha Carter had assisted in the drafting of the application, and that they had conferred with counsel, and that they had assisted in developing a legal strategy. Yet, Mr. Baptist says that it was Richard Ozan who ordered the Fort Worth application prepared; Mr. Root didn't prepare the Fort Worth application, and Ms. Schulze, in this proceeding, has had no other counsel than Root or Don Martin. Moreover, on May 5, 1986, Schulze testified that she did not review the Fort Worth application before it was filed; that she hadn't discussed the application directly with counsel; and that she didn't have much involvement in the Fort Worth application before it was filed (Tr. 1694-1700).

78. As previously noted Tom Root prepared six applications for Richard Ozan. When she answered interrogatories about those applications, Ms. Schulze swore that various named principals conferred with counsel. For example, she swore that she and Irene Wagner conferred with Root about the Tolleson application; that she conferred with Root about the Castle Rock application. However, Root made it clear that the only person he obtained information from was Mr. Ozan.

79. Finally, in their supplemental interrogatory answer number 15, Ms. Schulze denies that Richard Ozan had any substantive involvement with any of the applications after they were prepared. However, the record shows otherwise. The last two applications (for Blanco and Rock Hill) were filed on March 20, 1985. Yet Mr. Ozan met with Mr. Root in May 1985 to discuss his applications (Tr. 1844), and he paid bills for the applications in April and May 1985.

Issue 6 - Schulze's Castle Rock Lack-of-Candor-Issue

80. On November 4, 1985, a site availability issue and an inter-related lack-of-candor issue was added against Dorothy O. Schulze in the *Castle Rock* proceeding. See *Castle Rock Communications, Ltd.*, FCC 85M-4291. The issues were added because one of Schulze's opponents alleged that Schulze hadn't even *initiated* any arrangements to obtain the site specified in her application.

81. After Schulze dismissed her application in the *Castle Rock* case, Issue 6 was transferred to this (the *Blanco)* proceeding. See FCC 86M-293, released January 23, 1986. The burden of proceeding on the transferred issue was placed on Opal Chadwell while the burden of proof remained with Schulze and Brigham.

82. Shortly thereafter Schulze and Brigham's attorney, Donald Martin, telephoned Ronald Baptist at his home in Andover, Massachusetts. Baptist's name, but not his signature, was affixed to Schulze's Castle Rock engineering. Martin told Baptist that he (Martin) had a problem, and that he needed Baptist to testify in the *Blanco* case. Martin further said he needed Baptist to testify about how he (Baptist) had secured Dorothy Schulze's *Castle Rock* site.

83. Baptist replied that he couldn't do that because he had had nothing to do with securing the *Castle Rock* site, Tom Root had secured it. Martin replied that he had had trouble getting Root to cooperate. [43] Martin said he needed Baptist to detail how he had secured the *Castle Rock* site. Baptist replied: "I've never secured a transmitter site in my life" (Tr. 2198).

84. But Martin persisted. He said that it would be a shame for the *Blanco* application to suffer from a mistake Root made or Baptist was responsible for in *Castle Rock.* Baptist agreed. He wanted Dick Ozan to get an even break in *Blanco.* So he said he'd testify on Schulze and Brigham's behalf [44] (Tr. 2199).

85. Baptist arrived in Washington, D.C. late Sunday night, February 23, 1986, prior to the February 24, 1986 hearing session. Early on the morning of February 24th he had breakfast with Don Martin, and Dorothy and Larry Schulze. At that breakfast, Don Martin and Ron Baptist "...concocted a false story that we thought would fly and get that tower issue dropped." They "...looked for a story that wouldn't have any holes in it..." Baptist said: "we tried a couple and they didn't work and Don said "well, no, this won't work' and Don said, "well, why don't you say this?"' Finally they arrived at the story Baptist was to give on February 24, 1986. Dorothy Schulze was present and heard Martin and Baptist concoct the story. She said nothing.

86. On the morning of the February 24th hearing, while Ms. Schulze was still on the stand, but before Baptist had testified, the Presiding Officer indicated that it might be necessary for Tom Root to testify to clear up a few things (Tr. 612-613). When Baptist heard that, he was shocked because he knew his false story would be contradicted by Root. So he wrote a note to Don Martin. The note said "better talk to Tom Root before I go on the stand." Martin said, "I'll take care of Tom Root" (Tr. 2243).

87. Baptist went ahead and gave his false testimony. He swore that Mr. Root had hired him to secure a transmitter site for Dorothy Schulze; [45] that he secured sites for a living and secured over 400 transmiter sites per year; that he had secured the Castle Rock site for Root; that he had no idea why or how his name came to appear on the Castle Rock engineering; [46] and that the reason there was no correspondence between Root and Baptist to document their Castle Rock transaction was because Root did last minute work.

88. The ink hadn't dried on Ron Baptist's falsifications before he began to have misgivings (Tr. 2239). Right after he left the stand he talked with Don Martin, and told him that he (Baptist) felt he had done something wrong. But Martin assured Baptist "...that conflicting testimony was a very general thing and not to worry about it." Still Baptist was concerned. He contacted Lee Shubert, a Washington attorney. Shubert advised Baptist to recant his untrue testimony.

89. Baptist also called Tom Root, apologized, and offered "to go back in and tell the truth and clear this up for you" (Tr. 1212, 2240). Later that evening Baptist telephoned Dorothy Schulze. He was agitated because he felt that he had perjured himself on the stand. He told Ms. Schulze that "...he was going to call Judge Miller..." Ms. Schulze asked him to wait until the following morning, that by then she would have consulted with Don Martin, her attorney, and decided what her situation was at that point (Tr. 2322).

90. The following day, Mr. Baptist again called Ms. Schulze, and said he wanted to recant. Although he had been Ms. Schulze's witness, she told him "...that he did not need my permission and that he needed to go ahead and do what he needed to do," and "...whatever he elected to do with regard to his own conscience was his business and that I had to deal with the fallout- Baptist told her that he believed Don Martin was corrupt and that Schulze should fire him (Tr. 2323-2324). [47]

91. After Ron Baptist testified at the February 24, 1986, hearing session, the Presiding Officer enlarged the scope of the issues. See FCC 86M-879, released March 6, 1986 There he stated that he had reason to believe that Ron Baptist had previously given false testimony. See FCC 86M-879 *supra.*, Footnote 3. He further indicated that he expected "...testimony from at least Elizabeth Anderson JoAnn Garcia, and Richard Ozan. It may also be necessary to adduce further evidence from Thomas Root and Ron Baptist..."

92. Cn May 16, 1986, Opal Chadwell notified all the parties that she had "recently been informed by Mr. Baptist that previous testimony given by him was false, and that it was procured by Schulze and Brigham, and that he now desires to recant it..." On May 21, 1986, the Presiding Officer, *inter alia,* ordered Chadwell to "present testimony from the following witnesses: Tom Root, Ron Baptist, and Richard 0zan..." (FCC 86M-1719). Baptist returned to the stand on June 6, 1986, and recanted.

93. *Intermediate Findings on Issue 6.* Dorothy Schulze has more than lacked candor regarding the availability of her *Castle Rock* transmitter site. She and her attorney, Donald Martin, suborned perjury on that topic. On February 24, 1986, they presented the testimony of Ron Baptist as being the person who had secured the site. He hadn't. Tom Root arranged for the site to be made available. They made it appear that Baptist worked for Root, when just the opposite was true - Root worked for Baptist. They held out Baptist as a specialist in securing transmitter sites, when, in fact, he had never secured a transmitter site in his life. So it must be found that Schulze and Brigham are not basically qualified to be a Commission licensee. [48]

Issue 7 - The Standard Comparative Issue

Description of the Applicants

94. *Opal Chadwell.* Opal Chadwell filed her application for Channel 52 as a sole proprietorship. All bills, including those for legal and engineering services, relating to the prosecution of the application have been drawn on the account of Blanco Cablevision Corporation (Blanco Cablevision). Blanco Cablevision also financed Mrs. Chadwell's rulemaking petition to allocate Channel 52 to Blanco, Texas. Mrs. Chadwell indicates that these disbursements were advances against her salary (Tr. 255, 300-308, 317-318). [49]

95. *Schulze and Brigham.* Schulze and Brigham is ostensibly a Texas general partnership organized pursuant to an oral agreement. There are two partners, Dorothy Schulze, and one of her sisters, Deborah Brigham. Originally Ms. Schulze held 20% of the partnership's equity and Ms. Brigham 80%. However, subsequent to designation, and after they had filed their integration statement, by oral agreement, they amended their partnership. As amended each partner has 50% of the equity. See FCC 86M-268 released January 22, 1986. [50] There is no formal written partnership agreement or any other written agreement existing between the two partners.

96. *Blanco Communications, Ltd.* BCL is one of those "bizarre" and "Janus-like" limited partnerships that the Review Board recently analyzed in *Cotton Broadcasting Company*, 60 RR 2d 983 (1986). The partnership, formed pursuant to the Texas Uniform Limited Partnership Act, is composed of three individuals, but four different partnership interests. Maria Gracia Romero is a General Partner and has a 10.5% ownership interest in BCL; Benjamin Franklin Pittman is a Limited Partner and has a 43% ownership interest. The third person, Sidney Paul Dubose is both a General Partner with an attributed 9.5% ownership, and a Limited Partner with a 37% ownership. For voting purposes the Partnership Agreement provides that Maria Gracia Romero will have a 51% vote, and Sidney Paul DuBose a 49% vote.

Diversification of Mass Media

97. *Opal Chadwell.* Opal Chadwell is Secretary/Treasurer, Director, and a 39.7% owner of Blanco Cablevision. Her husband, Earl Chadwell is President, Director, and a 39.7% owner of Blanco Cablevision. [51] Blanco Cablevision owns and operates a cable television system serving Blanco, Texas. It also has the following low-power television applications pending before the Commission: Channel 47, Johnson City, Texas (BPTTL-82061719) and Channel 26, Johnson City, Texas (BPTTL-820617RS).

98. At the time this case was designated for hearing on August 8, 1985, Blanco Cablevision was the permittee of a UHF low-power television station on Channel 45, Johnson City, Texas. However, Blanco Cablevision never sought an extension of time to construct the station, and on October 7, 1985, the Commission cancelled the permit for failure to complete construction.

99. Both Opal Chadwell and her husband have committed to divest their ownership interests and resign their positions as officers and directors in Blanco Cablevision.

100. *Schulze and Brigham.* Neither Dorothy Schulze nor Deborah Brigham have any attributable media interests.

101. *Blanco Communications Ltd.* None of BCL's principals have any attributable media interests.

The Best Practicable Service

102. *Comparative Coverage.* The following chart (based on Joint Exhibit, p. 9) shows the total areas and populations each applicant would serve within their Grade B (64 dBu) contours, and the common areas and populations:.

CHART

Applicant	Area (sq. mi.)	Population
Blanco (BCL)	13,632	1,742,506
S&B	11,862	1,690,379
Chadwell	7,110	1,569,606
Common Area	7,110	1,569,606

103. The following chart analyzes each applicant's Grade B service area according to the number of other commercial television services available:

CHART

Number of Other Television	Blanco (BCL) Areas (sq. mi.)	Blanco (BCL) Pops.	S&B Areas (sq. mi.)	S&B Pops.	Chadwell Areas (sq. mi.)	Chadwell Pops.
0 Services	1,243	4,339	833	3,259	0	0
1 Service	1,847	37,660	1,530	36,630	169	8,275
2 Services	461	2,015	418	1,845	126	785
3 Services	427	2,343	407	2,291	109	731
4 Services	2,623	150,013	2,430	146,196	901	137,105
5 or more Services	7,031	1,546,136	6,244	1,500,158	5,805	1,422,710

104. *Intermediate Coverage Findings.* An analysis of the two foregoing charts (Findings 102-103 *supra.)* leads to the following intermediate findings. Both Blanco and S&B would serve moderately sized "white" areas and significantly larger "grey" areas than Chadwell. Chadwell would provide some "grey" area service, but no first service. Blanco and S&B also would serve more total areas and populations than Chadwell would.

105. Blanco's "white" and "grey" areas are slightly larger than S&B's. It also enjoys a slight advantage over S&B in total areas and population.

106. Accordingly, both Blanco and S&B are entitled to substantial preferences over Chadwell for the quantitative sum of their coverage advantages. Blanco is also entitled to a moderate preference over S&B for the quantitative sum of its coverage advantages. [52]

Integration of Ownership With Management

107. *Opal Chadwell.* Opal Chadwell, as a sole proprietor, claims a quantitative integration credit of 100%. She will be the station's General Manager, and will devote at least forty hours a week to this position. As General Manager, she will recruit and manage the entire station staff; she will prepare and supervise the programming, sales, and promotion plans; and she will generally administer the station's overall operation. She will ensure that the station meets the needs and interests of Blanco, and that it complies with all FCC rules and regulations.

108. Mrs. Chadwell resides in Wimberly, Texas, within the Grade "A" contour of her proposed operation. Wimberly is about 7 miles from Blanco. She resided there from 1973 to 1975 and from 1984 to the present. From 1975 to 1983, she resided and was registered to vote in Blanco.

109. Opal Chadwell has over 23 years experience in management positions in business. As previously noted (Findings 94, 97, and Footnote 49 *supra.),* she is the Secretary/Treasurer, Director, and day-to-day manager of the Blanco Cablevision Corporation.

110. She is civically active in Blanco. She helped establish the Fraternal Order of Eagles in 1980-1981, and continues to be an active member in that organization. She is a member of the Blanco City Planning Committee. She provides promotional assistance to the Mayor and the city of Blanco.

111. Mrs. Chadwell has program production experience, and with her own equipment and funds, and on her own time, she produces free programming for the Boy Scouts, the Blanco School Carnival, the annual Blanco County Fair, and the County Rodeo.

112. Opal Chadwell seeks enhancement for being a female. [53]

113. *Schulze and Brigham.* Schulze and Brigham (S&B) claim they are entitled to 100% quantitative integration. They claim that they will integrate both general partners, Dorothy Schulze and Deborah Brigham into the proposed station's day-to-day operations.

114. S&B's claim must be disallowed for either of two reasons. First, it has previously been found that neither Ms. Schulze nor Ms. Brigham had *de facto* control of the *Blanco* application. This record shows that their brother, Richard Ozan, who had *de facto* control over ten interrelated applications, including the instant *Blanco* application is the real party-in-interest. See Findings 70-79 *supra.* This is Richard Ozan's application, not Schulze and Brigham's. So, not being owners, their integration in the proposed station's management is meaningless.

115. Secondly, Schulze and Brigham failed to establish themselves as a valid partnership. Although they represented in their application that they were a general partnership, they took no steps to form such a partnership before filing. They didn't have and have never had a written partnership agreement. Moreover, although they testified that they had an oral agreement, it has no terms. The only concrete fact they could swear to was that Dorothy Schulze would be a 20% partner and share 20% of the liabilities, and Deborah Brigham would be an 80% partner and assume 80% of the liabilities. [54]

116. The oral partnership has no specified duration; there are no terms for withdraw of or addition of partners; the partnership has no assets, no bank account, and has never filed a tax return. The partnership has never applied to the Internal Revenue Service for a taxpayer identification number; they have never made any filings with the state of Texas concerning the partnership; and there are no partnership financial records. So Schulze and Brigham cannot be considered a viable partnership for integration purposes.

117. However, *assuming arguendo* that Schulze and Brigham could be considered a viable applicant for integration purposes, the following findings are in order.

118. S&B proposes to integrate its 20% partner, Dorothy 0. Schulze, into the station's proposed operation as General Manager. She will devote at least 40 hours a week to that position. As General Manager she will supervise all department heads, including programming sales, promotion, and engineering. She will lead the management team in developing and determining station policy. While she has no broadcast training or experience she intends to hire a consultant to help her with her duties as general manager. The length of time that consultant will be present hasn't been determined.

119. Dorothy O. Schulze resides in San Antonio, about forty miles from Blanco. She does not intend to move to Blanco if S&B's application is granted.

120. Up until some point during the hearing Ms. Schulze was the managing editor of the *I-10 Express,* a monthly direct-mail marketing publication that serves the corridor around Interstate Highway 10 in San Antonio. She no longer works there, but she intends to continue working as a free-lance writer in the future. She has not been active in civic activities in Blanco. She seeks integration enhancement for being a female.

121. S&B also proposes to integrate its 80% partner, Deborah Brigham, into the proposed station's day-to-day operations. Mrs. Brigham will devote at least 40 hours a week to being the station's Program Director. As Program Director she will supervise the programming staff, and generally oversee the production, review, selection, acquisition, and scheduling of programming. Although she owns 80% of the partnership she will be under the supervision of her sister, Dorothy Schulze. Since she has no previous broadcast experience, she intends to hire a consultant to help her carry out her duties as Program Director and teach her the job.

122. Deborah Brigham resides in San Antonio. She is not now, and never has been civically active in Blanco. Ms. Brigham was employed by the USAA insurance company from September 10 until June 1985. When she left the company she was a senior sales specialist. She claims integration enhancement for being a female.

123. *Blanco Communications, Ltd.* BCL claims it is entitled to 100% quantitative integration. It says it will fully integrate its two general partners, Sidney Paul DuBose and Gracia Romero into the station's day-to-day operations.

124. First, BCL claims that it will integrate a combination general partner/limited partner Sidney Paul DuBose into the proposed station's day-to-day operations. As previously noted (Finding 96 *supra.)* Mr. DuBose has a limited partnership ownership interest of 37% and a general partnership ownership interest of 9.5%. For voting purposes, under the limited partnership agreement Dubose, as a General Partner, has a 49% voting interest. DuBose will work full-time (no less than 40 hours a week) as the station's General Manager. In that capacity he will be responsible overall for the day-to-day management of all aspects of the station's operations.

125. DuBose's integration claim will be disallowed. As previously noted (Finding 96 *supra.),* BCL's Janus-like arrangement cannot be countenanced for integration purposes. BCL's limited partnership agreement will be taken at its word and we will treat Sidney Paul DuBose as a limited partner for ownership integration purposes. Hence no credit will be awarded for his general partner activities. This effectively negates 49% of BCL's general partnership voting power. See *Cotton Broadcasting Company, supra.*

126. Next, BCL claims it will integrate Mrs. Gracia Romero, a 10.5% general partner, into the station's day-to-day operation. Mrs. Romero, an Hispanic female, will be the station's full-time Station Manager/Public Affairs Director. In that capacity she will purportedly work with Mr. DuBose to oversee the station's day-to-day operations, but she will focus primarily on public affairs. She will serve as the station's liaison to the community and will

help formulate programming responsive to community needs. She will ostensibly vote 51% of the general partnership.

127. Mrs. Gracia Romero's integration claim will also be rejected. BCL's opponents have demonstrated that Mrs. Romero's involvement as a 10.5% general partner with 51% voting power is "merely a "facade to maximize [BCL's] chances of winning the comparative hearing."' Mrs. Romero has never been a *bona fide* general partner in any sense of the term.

128. This record establishes that it was Sidney Paul DuBose who approached Gracia Romero about becoming a BCL general partner. DuBose knew Mrs. Romero because her husband has worked as a ranch hand for DuBose or his family for over 30 years. He approached her because he needed to strengthen BCL's comparative position via female and minority enhancement (Tr. 482-484). Originally DuBose told Mrs. Romero that she would have a 15% interest and be the only general partner. He told her that the money would be good since she was a minority (Tr. 482).

129. From the time DuBose recruited her through the present time Mrs. Romero has had no broadcast experience. [55] In fact, she has been a nonsupervisory nurse's aid since 1964. So from the outset Mr. DuBose has been the moving force behind BCL's application. It was DuBose who initiated the preparation of BCL's application. He took it to Mrs. Romero, completed it in her presence, asked for her signature, and then obtained the signature of Benjamin Pittman, the other limited partner.

130. DuBose took Romero with him to open BCL's bank account, which was opened with DuBose's funds. While Mrs. Romero was made signatory to BCL's account, she has written no checks unless DuBose directed her to do so. Although DuBose told her that BCL was financially qualified, Mrs. Romero was left entirely in the dark about BCL's financing.

131. It was DuBose who hired, supervised, and communicated with BCL's engineer and attorney. At one point, Romero claimed that she supervised these people along with DuBose. but she couldn't cite single example of such supervision. Later (Tr. 630) she candidly admitted that she was unable to supervise BCL's employees without help from DuBose. While she was originally the only general partner, and was designated the managing general partner under the limited partnership agreement, Mrs. Romero never acted in that capacity (Tr. 559-565, 567, 569). [56]

132. From the outset Mrs. Romero, although purportedly a general partner, has played a completely passive role. She had no part in structuring the applicant. [57] She has never initiated any activities on behalf of BCL. [58] And she has no real grasp of her role in and her obligations to the limited partnership (See Tr. 492, 495-497, 504-510, 556-557, 576, 581 and 583-594).

133. *Intermediate Integration Facts.* Based on the foregoing (Findings 107-132 *supra.)* certain intermediate integration facts are appropriate. Opal Chadwell is entitled to 100% quantitative integration. Her opponents suggest that Mrs. Chadwell isn't prosecuting her own application, and that she is nothing more than a front for Blanco Cablevision. That suggestion is rejected (See Footnote 49 *supra.).*Opal Chadwell is the mistress of her own destiny. She is and has been prosecuting BPCT-850103KK on her own behalf.

134. On the other hand, and *assuming* that Schulze and Brigham were basically qualified to be a Commission licensee, [59] they would not be entitled to any quantitative integration credit whatsoever. They haven't demonstrated that they are a viable partnership for integration purposes. See Findings 113-116 *supra.*

135. Similarly, and *assuming* that BCL was basically qualified to be a Commission licensee, [60] it would not be entitled to any quantitative integration credit whatsoever. See Findings 123-132 *supra., Cotton Broadcasting Company,* 60 RR 2d 983 (1986), and *KIST Corp.,* 57 RR 2d 49 (Rev. Bd. 1984).

136. Thus, except for comparative coverage, (See Findings 102-106 *supra.),* it is apparent that Opal Chadwell would be the comparative winner under integration of ownership with management criterion.

Ultimate Findings of Fact and Preliminary Conclusions of Law

1. Three mutually-exclusive applicants seek authority to operate on UHF Channel 52 in Blanco, Texas: Opal Chadwell; Dorothy O. Schulze and Deborah Brigham, a General Partnership; and Blanco Communications, Ltd.

2. The three applicants presented evidence on seven factual issues, six of which were basic qualifying issues. All three faced an air hazard issue (Issue 1); Opal Chadwell and BCL each were confronted with a misrepresentation issue (Issues 2-3); Schulze and Brigham had to meet a 47 CFR 1.65 issue (Issue 4), and two misrepresentation issues (Issues 5-6). The seventh issue upon which the applicants adduced evidence is the standard comparative issue.

The Basic Qualifying Issues

3. We must turn first to the basic qualifying issues. For it is axiomatic that only basically qualified applicants are entitled to a comparative analysis. See e.g. *Louis Adelman, 29 FCC 1223, 18 RR 1062 (1960) affirmed sub. nom. Guinan v. Federal Communications Commission,* 297 F.2d 782, 22 RR 2026 (1961).

4. *The Air Hazard Issue - Issue 1.* All three applicants are basically qualified on this issue. Each has demonstrated that their proposed tower would not constitute a hazard to air navigation (Finding 6 *supra.).* So Issue 1 will play no role in the outcome of this proceeding.

5. *The Chadwell-BCL Misrepresentation Issues - Issues 2-3.* Issues 2 and 3 are an interwoven pair. They were designated because of cross accusations between Sidney Paul DuBose, BCL's moving principal, and Opal Chadwell. DuBose accused Chadwell of misrepresenting facts to the Commission regarding the availability of the site that she had specified in her original application.

6. Chadwell admits that she originally specified a site on land that she thought belonged to Sidney Paul DuBose; that when she went to him to obtain reasonable assurance that she could use his land for a transmitter site he falsely led her to believe he owned the land, and that it was available for her use; and that as soon as she discovered that she had been duped by Mr. DuBose, she obtained a new transmitter and amended her application.

7. Because DuBose's and Chadwell's versions of what had transpired directly conflicted on several key matters, the Presiding Officer realized that either one or the other or both were lying. So he designated a misrepresentation issue against each of them. See FCC 85M- 4590, released November 22, 1985.

8. The record evidence (Findings 7-26 *supra.)* demonstrates that it was Sidney Paul DuBose who dissembled, and that Opal Chadwell has told the truth. Upon the advice of her counsel, Chadwell asked DuBose for a

"reasonable assurance" letter. While DuBose stalled about giving her such a letter, he led her to believe that one would be forthcoming. What DuBose was really doing was playing for time. He knew from the outset that the site coordinates that Chadwell was specifying wasn't part of the DuBose ranch. But he needed time to secure communications counsel to form a limited partnership, and to prepare and file a competing application. So he led her to believe that he owned that land. He never leveled with her until that competing application was in fact prepared and filed.

9. So it is concluded that Sidney Paul DuBose lied to the Commission when he swore that: "...I was not asked to provide a letter stating Ms. Chadwell could use my property. At no time did I indicate would provide such a letter, nor did I give oral assurance my property could be used..

10. It is further concluded that Sidney Paul DuBose lied when he told the Commission that "...I never gave verbal affirmation that Ms. Chadwell could use my ranch for her tower. Ms. Chadwell never asked for, nor did I ever agree, to provide a letter indicating she could use my ranch ... At no time after Ms. Chadwell filed her application did I know that she had specified a site she thought was on my property.."

11. Against that background (Conclusions 5-10 *supra.)*, it is concluded that Opal Chadwell hasn't misrepresented facts to or lacked candor with the Commission regarding the availability of her original transmitter site. Thus Issue 2 is resolved in her favor, and she remains basically qualified to be a Commission licensee.

12. Conversely, it must be concluded that BCL principal Sidney Paul DuBose lied to and lacked candor with the Commission in pleadings filed in this proceeding on October 7, November 1, and November 6, 1985; that such misrepresentations and lack-of-candor brand DuBose as untrustworthy and unreliable; and that therefore BCL isn't basically qualified to be a Commission licensee. It follows then that Issue 3 is decided adversely to BCL and it is not eligible for comparative consideration.

13. *The Schulze-Brigham Character Issues - Issues 4-6.* It is concluded under Issue 4 (the 1.65 issue) that Schulze and Brigham have violated 47 CFR 1.65. They deliberately didn't update their Blanco application. Moreover, they failed to keep it complete and accurate by withholding substantial changes of decisional significance. They failed to report Dorothy Ozan's (Dorothy Schulze's) participation in the Salinas-Oatman TV application for San Antonio (BPCT-841129LF), and they failed to report that Dorothy Schulze's brother, Richard Ozan, was a real party-in-interest to the *Blanco* application. Most importantly, when confronted with her 1.65 violations, Ms. Schulze tried to lie her way out of it. She dissembled, and she presented witnesses who dissembled. So Issue 4 is decided adversely to Schulze and Brigham, and it is concluded that their 1.65 violations adversely affects their basic qualifications to be a Commission licensee. So even if Issue 4 were the only character issue that Schulze and Brigham faced, it would be concluded that they are not basically qualified to be a Commission licensee, and therefore not entitled to comparative consideration.

14. Next, it is concluded under Issue 5 that Schulze and Brigham have misrepresented to and lacked candor with the Commission about Dorothy Schulze's other broadcast ownership interests. Dorothy Schulze lied about her role in the Conroe, Texas application (Fnding 48 *supra.)*, and she sponsored a witness, JoAnn Garcia, who lied about both her (Garcia's) and Schulze's role in the *Conroe* application; Ms. Schulze lied about her sister's (Elizabeth Anderson's) role in the *Conroe* application; and she (Ms. Schulze) lied about her brother's (Richard Ozan's) role in the *Conroe* and other applications (See Findings 47-69 and 70-79 *supra.)*. So even if Issue 5 were the only character issue outstanding against Schulze and Brigham, it would be concluded that their misrepresentations and lack of candor to the Commission regarding Dorothy Schulze's other broadcast interests render the partnership basically unqualified to be a Commission licensee. Ergo they are not entitled to comparative consideration.

15. *Assuming* that Schulze and Brigham were basically qualified under both Issues 4 and 5, they would still be basically unqualified. Under Issue 6 it must be concluded that Dorothy Schulze has misrepresented the facts to and lacked candor with the Commission about the availability of her proposed antenna site in the *Castle Rock* proceeding. See Findings 80-93 *supra.* In fact, Dorothy Schulze, via her attorney Donald Martin, suborned perjury on that question.

16. On February 24, 1986, Dorothy Schulze presented the testimony of communications consultant Ronald Baptist as being the person who had secured the site. He hadn't, and Ms. Schulze knew he hadn't. Schulze and her attorney, Donald Martin, made it appear that Baptist worked for Tom Root, when just the opposite was true - Root worked for Baptist. They held Baptist out as a specialist in securing transmitter sites, when, in fact, he had never secured a transmitter site in his life. Such an abuse of the Commission's adjudicatory processes cannot and will not be condoned. So it must again be concluded that Schulze and Brigham are not of fit character to be a Commission licensee, and thus are not eligible for comparative consideration.

Ultimate Conclusions

17. It is not necessary to make any comparative conclusions in this case. [61] Only basically qualified applicants are entitled to comparative consideration, and two of the three applicants, Schulze and Brigham and BCL, are not basically qualified to be Commission licensees. Only Opal Chadwell is. So no comparison is necessary, and Issue 7 is moot.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Opal Chadwell (BPCT-850103KK) IS CRANTED subject to the following conditions:.

> Prior to commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Opal Chadwell and Earl Chadwell have severed all interest in, and connection with Blanco Cablevision Corp., Blanco, Texas.

And the applications of Dorothy 0. Schulze and Deborah Brigham, a General Partnership (BPCT-850320KG) and Blanco Communications, Ltd. (BPCT-850320LC) ARE DENIED. [62]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge
Federal Communications Commission

FOOTNOTES

[1] Balcones Broadcasting Co. didn't actively participate in this proceeding. See Tr. 47-48.

[2] FCC 86M-293 actually broadened the scope of the 47 CFR 1.65 and misrepresentation issues that had been added against Schulze and Brigham back on November 22, 1985 (FCC 85M-4583 *supra.).*

[3] In the interest of uniformityand organization of this Decision, the issues have been renumbered.

[4] Issues 2, 3, 4, and 5 have been modified to remove any comparative character analysis. See *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179 (1986) at paras. 110-113, 59 RR 2d 801 (1986).

[5] The Chief, Video Services Division has called for a comparative coverage analysis under the standard comparative issue. See 50 F.R. 36143, *supra.,* at para. 5.

[6] Schulze and Brigham's supplements convey the impression that their counsel would read their opponents' findings and/or reply findings and then engage in one-upsmanship by filing a supplement.

[7] Although it could be argued that since Earl Chadwell is Opal Chadwell's husband, his testimony was biased, the Presiding Officer is convinced that he was a truthful, reliable witness. He appeared forthright and honest. He wasn't unduly hesitant or evasive when he answered the questions propounded to him. He appeared to be reasonably certain of his answers without being flippant. He was cooperative. So the Presiding Officer has credited his corroborating testimony.

[8] Celestino Romero is the husband of Maria Gracia Romero, a 10.5% General Partner in the BCL limited partnership.

[9] Mr. DuBose denies ever being asked to provide a "reasonable assurance" letter.

[10] Mr. DuBose doesn't recall seeing any map on the wall (Tr. 788-789).

[11] Since Mr. DuBose denies ever seeing a map he denies this incident ever took place. One of these maps was produced in the hearing room and accepted into evidence as Chadwell Exhibit PII-11.

[12] DuBose swears that "[a]t no time after Ms. Chadwell filed her application did I know that she had specified a site she thought was on my property." This assertion is rejected. It defies credulity.

[13] Thus the finding is inevitable that DuBose knew well before Opal Chadwell had filed her application, if not from the outset, that she had mistakenly specified coordinates for land he didn't own. The record is also clear that he never told her about her mistake until he had used it to his full advantage.

[14] Opal Chadwell petitioned to enlarge the issues against Schulze and Brigham on October 22 1985. The petition was unopposed. However, Schulze and Brigham later tried unsuccessfully to have the issues favorably resolved by summary decision. See FCC 86M-635, released February 20, 1986.

[15] The Salinas-Oatman application was later dismissed for failure to prosecute; i.e., *inter alia,* for failing to submit vital ownership information called for by the HDO in that case. See FCC 85M-2969 released July 29, 1985.

[16] Dorothy "Schulze" has been known as Dorothy "Schulze" for at least 14 years before the San Antonio application was filed. In fact, Gloria Salinas-Oatman has known Dorothy's husband, Larry Schulze, since before Dorothy and Larry were married.

[17] This simply could not be, because the Commission didn't release the Blanco cut-off list until February 14, 1985 (Tr. 2223; Chadwell Exhibit No. III-26).

[18] This explanation makes no sense whatsoever since Salinas-Oatman herself is not only a female but a minority female. So even without Schulze's involvement, the applicant would have been 100% female owned, and female-minorityowned at that.

[19] The Conroe filing will be discussed in greater detail *infra.*

[20] As it turned out the Conroe and San Antonio applications were only two of a series of applications that Richard Ozan commissioned Ron Baptist to file. See *infra.*

[21] Root and Richard Ozan also discussed filing applications for other locations; i.e., locations other than Conroe and San Antonio.

[22] Dorothy Schulze's claim that her $1,000 payment to Root was some sort of retainer for future filings is rejected as being patently incredible. No such future filings were contemplated at that time.

[23] Ron Baptist also believed that the San Antonio application was structured to include Schulze.

[24] It should be noted that Deborah Brigham is another one of Richard Ozan's sisters.

[25] The word "purportedly" is used because this is another application that Richard Ozan commissioned Ron Baptist (and Tom Root) to prepare and file. See Findings 41-42 *supra.*

[26] Ms. Schulze subsequently entered into a settlement agreement, and dismissed her *Castle Rock* application. See FCC 86M-115 released January 10, 1986.

[27] To this day Dorothy Schulze hasn't satisfactorily answered that, question. She says she doesn't know where the incorrect information came from but she assumed that it came from Tom Root's office (Tr. 575). But Root swears that his office never provided the inaccurate information. He says the only information he had was contained in the files for the applications, all of which were eventually turned over to Ms. Schulze's new counsel, Donald Martin (Tr. 1926-1927).

[28] It must be remembered that it was Elizabeth Anderson and not JoAnn Garcia that gave Tom Root a $1,000 check for preparing and filing the *Conroe* application. Findings 44 *supra.*

[29] At Tr. 1602, Ms. Anderson testified that she doesn't know who ows the other 20% of G-A's non-votingstock. It appears that G-A's ownership structure may or may not be worded wrong. JoAnn Garcia may own 20% of the corporate equity and 100% of its voting stock, while Elizabeth Anderson owns 80% of the corporate equity, and 100% of the non-voting stock (Tr. 1912-1913). In any event that's a far cry from what Dorothy Schulze reflected in her August 14, 1985 *Castle Rock* amendment. See Finding 48 *supra.*

[30] For example, Mr. Ozan recommended Tom Root, but Ms. Garcia did the actual hiring (Tr. 1538).

[31] Portions of the Conroe application designate the applicant as being "G-A Communications, Inc." but the bulk of the references are to a "G-A Corporation."

[32] Root did, however, send a blank 301 Form for Conroe to Richard Ozan (Finding 43 *supra.).*

[33] See Findings 28 and 43 *supra.,* where Root drafted an almost identically worded exhibit for the San Antonio application.

[34] At first blush it seemed strange that *both* Gloria Salinas-Oatman (Findings 27-46 *supra.)* and JoAnn Garcia (Findings 47-69 *supra.)* would weave such a set of similar fabrications about their respective applications. However, subsequent testimony given by Ron Baptist at the final June 6, 1986 hearing session brought the testimony into focus. There Ron Baptist testified about how Ms. Schulze (via her counsel Don Martin) suborned perjury in this proceeding. See Tr. 2202-2205. This latter matter will be covered *infra.*

[35] Ozan filed an application for Forth Worth. There the partners were to be Martha Carter (Ozan's cousin), and Dorothy Schulze (0zan,s sister). It is not clear who prepared the application. Root was unable to prepare it because of a conflict of interest. But he agreed, as a courtesty, to deliver the Fort Worth application to the Commission for filing, and did so upon receipt of the completed application from Martha Carter. The reason it is not clear who prepared the application is because there is no

transmittal letter or signature on the engineering portion of the application. The Fort Worth application was dismissed when Dorothy Schulze not only discovered that her signature on the application was forged, but that the forger had even misspelled her name.

[36] Early in this proceeding Dorothy Schulze swore that her brother, Richard Ozan hadn't been involved in the Fort Worth, Rock Hill, Tolleson, Charleston and Castle Rock appplications other than to advise her that the stations were available; i.e., that he had not contacted any engineers or attorneys about such applications. Subsequent testimony proved Ms. Schulze's testimony abjectly false.

[37] Root couldn't prepare the other four applications; i.e., the Blanco, the Fort Worth, the Rock Hill, and the Omaha applications because of conflict of interest problems.

[38] Ozan also worked with Mr. Baptist to obtain an application for Omaha, Nebraska, even though Root was unable to assist.

[39] At Tr. 1706 Ms. Schulze states that Mr. Root had conflicts, and recommended Mr. Emert to Mr. Ozan on her behalf. But Richard Ozan swears that Root never told him why he could not prepare the applications, and that Mr. Baptist (not Root) recommended Mr. Russell (not Emert) to Mr. Ozan (not on behalf of anyone).

[40] Media Properties, Inc. looked to, and received payment from Richard Ozan for filing the Blanco and Rock Hill applications. See e.g. Chadwell Ex. III-25, Check No. 113, and Chadwell Ex. III-5. Ozan paid $3,300 for Media Properties' services.

[41] Dorothy Schulze's testimony on this point wasn't much better and varied considerably from Mr. Ozan. Her estimates varied. She first testified that the amount of the loan to her brother was about $10,000 (Tr. 407, 1408). Then she lowered the amount to $8,800. She finally settled on an amount of about $6,579 that Richard owed her. But this included more than the loan. It included his contributory share towards various family gifts. She says Richard owed her $4,000 for monies she paid to her sister Mary on his behalf, $1,750 as his share of remodeling their mother's house, $310.73 for an airline ticket for their mother, $339 for a cocktail table, and $179.27 for ceiling fans.

[42] See *KIST, Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984). There the Board found that the involvement of an 80% owner was "merely "facade to maximize [that applicant's] chances of winning the comparative hearing."' The Board has noted that the Commission will be keen to avoid "sham" arrangements; i.e., where parties "...seek to disingenuously manipulate their ownership structure so as to receive, for example, a special racial or sexual preference.,

[43] A little later Baptist talked to Root, and Root said he'd be glad to cooperate. But Martin then said that out of courtesy he didn't want to put Root on the stand. In view of the testimony that Root gave on February 26, 1986 (Tr. vol. 7) and again on June 5, 1986 (Tr. vol. 9), it is obvious why Martin didn't want Root to testify.

[44] Baptist acknowledges that this is where he made a bad decision (Tr. 2199). He shouldn't have tried to help out, and just let the system work (Tr. 2203).

[45] As it turned out it was Ron Baptist and Richard Ozan who hired Tom Root, not vice versa. See Findings 40-44, 71, 73 *supra*.

[46] Baptist went so far as to say that Mr. Root must have affixed his name to the engineering without his (Baptist's) permission. It turned out that Root had attributed the engineering to Baptist, but with Baptist's permission.

[47] Baptist says that at that time he felt he had been "coerced and used" (Tr. 2252). But he also says "...I was dumb enough to let it be done to me -- so I'll just blame myself." Baptist also recognizes that he was a loser the day he testified. He says that "...the decision that my wife and I reached was that a guy just can't play God and do people favors. The system works and let the system work. And there's no win in any of this for me. I can't win no matter what I do... There's no gain. I can only lose here" (Tr. 2250).

[48] Donald Martin's conduct in this proceeding is not only troublesome, it's frightening. We have Ron Baptist's testimony that he suborned perjury. The testimony of Tom Root, Richard Ozan and Baptist suggests that he may have suborned perjury in the case of two other witnesses he sponsored; i.e., JoAnn Garcia and Gloria Salinas-Oatman. See Footnote 34 *supra*. What's more he wasn't too concerned about what he was doing. See e.g. Findings 82, 85 and 88 *supra*. But there is no question but that Martin's actions strike at the very heart of the hearing process. For if an attorney can knowingly present such perjured testimony with impunity, the entire process is in danger of breaking down, and the search for truth will become a sham. But what can be done about it? Where can adjudicators turn to for aid: the General Counsel's Office? the Commission? the Bar Association? Remember, this perjury has been going on in the courts year after year without anything being done about it. Altogether too frequently lawyers knowingly present perjured testimony;, sometimes they suborn it; they are directly responsible for it. Other times they knowingly present such testimony. But nothing has been done in the past, and nothing will be done here. However, duty-bound, the Presiding Officer has made the required findings under the issue.

[49] This is not to suggest that such disbursements are inappropriate. This record shows that Opal Chadwell is the dominant and moving force behind Blanco Television as well as her own application. The Presiding Officer observed her demeanor as well as her husband's. He is convinced that Opal Chadwell isn't fronting for anyone.

[50] For the purposes of any comparative analysis that may be needed the 80/20% ownership structure described in the integration statement will govern.

[51] Opal Chadwell's son, Ricky Benson, owns the other 20.6% of Blanco Cablevision (Tr. 243-244).

[52] See *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578 (Rev. Bd. 1984).

[53] She also claims minority enhancement for being a one-eight Choctaw Indian. That claim is rejected.

[54] Even this agreement runs contrary to Texas partnership law. Under Texas partnership law, *all* partners are liable for 100% of the partnership liabilities. Also see Finding 95 and Footnote 50 *supra*. Where Schulze and Brigham tried to orally amend their oral general partnership.

[55] While Mrs. Romero is a resident of Blanco, she is not now and never has been active in Blanco's civic activities (BCL Ex. 2; Tr. 674).

[56] Paul DuBose engaged in these activities (Findings 130-131 supra.) at a time when he was only a "limited partner," and when Mrs. Romero nominally had "...full and exclusive authority to manage and control the business affairs and operation of the partnership..."

[57] In fact, the Second Amended Agreement of limited partnership (Chadwell Ex. 18) was altered without Mrs. Romero being aware of it;, i.e., a clause was added that allows the limited partners to vote on the removal of a general partner where the general partner is adjudicated incompetent.

[58] At times Mrs. Romero's participation in BCL has not only been passive it has also been reluctant. At one point she decided that she didn't want to be involved at all anymore. But Mr. DuBose (her husband's employer) persuaded her to remain in the application.

[59] But see Findings 27-46, 47-69, 70-79, and 80-93 *supra*.

[60] But see Findings 7-26 *supra*.

[61] Note, however, that comparative findings have been made. See Findings 94-135 *supra*. So if an appellate body disagrees with any facet of this decision no remand will be required. Stated another way, findings of fact have been made on *all* the issues, and conclusions of law have been made on all *material* issues. See 47 CFR 1.267(b) and 5 USC 557(c)(A)..

[62] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-364

Amendment of Section 73.202(b),	RM-5223
Table of Allotments,	RM-5476
FM Broadcast Stations.	
(Lompoc, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1986 Released: October 22, 1986

By the Chief. Policy and Rules Division:

1. The Commission herein considers two separate petitions for rule making filed by the existing FM licensees in Lompoc, California. The first, filed by Crystal Broadcasting, Inc. [1], licensee of Station KRQK-FM (Channel 265A), requests the substitution of Channel 262B1 [2] for Channel 265A and modification of its license to specify operation on the Class B1 channel. The second, filed by Gold Coast Broadcasting, Inc. (Gold Coast), licensee of Station KXCC-FM (Channel 224A) and Broadcast Management Consultants ("BMC"), assignee, [3] jointly request the substitution of Channel 281B1 for Channel 224A and modification of the license of Station KXCC-FM accordingly.

2. A staff engineering study reveals that both Channels 262B1 and 281B1 can be substituted for Channels 265A and 224A, respectively, at the current sites of each station, in conformity with the minimum spacing requirements of Section 73.207 of the Commission's Rules.

3. Mindful of the Commission's modification policy, Gold Coast and BMC advise that should another interest in proposed Channel 281B1 be shown, there is another Class B1 channel (Channel 239B1) available to Lompoc to accommodate such interest. See, *Modification of FM and TV Station Licenses,* 98 FCC 2d 916 (1984). Channel 239B1 can be allotted to Lompoc in compliance with Section 73.207 of the Commission's Rules.

4. We believe the proposals set forth herein warrant consideration since they could provide wider area coverage services to the Lompoc area. Accordingly, we shall propose to modify the licenses of Station KRQK-FM to specify operation on Channel 262B1 in lieu of Channel 265A, and Station KXCC-FM to specify operation on Channel 281B1 in lieu of Channel 224A.

5. In light of the above, we consider it appropriate to seek comments on the proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with regard to the community listed below, as follows:

City	Channel No. Present	Proposed
Lompoc, California	224A, 265A 262B1,	281B1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before December 12, 1986, and reply comments on or before December 29, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Roger J. Metzler, Jr. Esq. and Edgar W. Holtz, Esq. Farrand, Malti, Cooper & Metzler Hogan & Hartson 701 Sutter Street 815 Connecticut Ave. N.W. San Francisco, California 94109 Washington, D.C. 20006-4072 (Counsel for Crystal Broad- (Counsel for Broadcast casting, Inc.) Management Consultants, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Applv to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

9. For further information concerning this proceeding, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Although Sunshine Wireless Co. of California initiated this petition, Crystal Broadcasting, Inc. became the licensee of Station KRQK-FM pursuant to an assignment of license effective March 8, 1986. In accordance with our policy requirements, it has indicated its support of this proposal, as amended, infra, at footnote 2.

[2] Although Channel 281B1 was originally requested as a substitute for Channel 265A, in light of the Commission's recent decision in MM Docket No. 85-313, 51 FR 20290, June 4, 1986, amending Section 1.420(g) of the Rules to allow stations to upgrade their facilities on adjacent channels, Crystal has amended its proposal in conformity with the new rules to request consideration of Channel 262B1.

[3] Gold Coast and BMC advise that they have entered into an agreement to assign the license of Station KXCC-FM to BMC, subject to Commission consent. Accordingly, this proposal is jointly filed to advise of BMC's interest in pursuing the proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-385

Amendment of Section 73.202(b), RM-5451
Table of Allotments,
FM Broadcast Stations.
(Redfield, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1986 Released: October 22, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the request of Victoria Broadcasting System, Inc. ("petitioner") to allocate Channel 256Cl to Redfield, South Dakota, as the community's third local FM service. [1] Channel 256Cl can be allocated in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.

2. Petitioner states that a Class C station would be too expensive to build. However, it believes that a Class C1 station would provide new full-time service to a large number of persons, including those in underserved areas, while being economically feasible to construct. Petitioner states that it will apply for the channel, if allocated.

3. We believe the public interest would be served by proposing the allocation of Channel 256Cl to Redfield since it could provide the community with an additional radio service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Redfield, South Dakota	249A, 279	249A, 256Cl, 279

4. The Commission's authority to institute rule making Proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 12, 1986, and reply comments on or before December 29, 1986 and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark E. Fields. Esq.
Miller & Fields, P.C.
P.0. Box 33003
Washington, D.C. 20033

Victoria Broadcasting System, Inc.
Box 110
Redfield, South Dakota 57469
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings, to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* Presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] The Commission, by *Notice of Proposed Rule Making*, 51 FR 18809, published May 22, 1986, proposed to substitute Channel 279C2 for Channel 279 at Redfield, at the request of Victoria Broadcasting based on our belief that no acceptable application for the channel was on file. Subsequently, the staff became aware of the application of Mary Verkest (850712TB) specifying minimum Class C facilities for Channel 279 at Redfield. On May 28, 1986, Victoria Broadcasting filed a counterproposal requesting the allocation of Channel 279Cl, rather than 279C2, at Redfield. In response, the Commission, June 9, 1986, adopted the *Memorandum* Opinion *and Order* in Docket 86-159 which rescinded the *Notice* based on our belief that the public interest would not be served by further consideration of the proposed downgrade of Channel 279 in light of the Verkest application and the fact that another Class Cl channel (Channel 256C1) was available for allocation at Redfield.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-386

Amendment of Section 73.202 RM-5449
Table of Allotments,
FM Broadcast Stations.
(Kalkaska, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1986 Released: October 22, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Northern Radio of Michigan, Inc. ("petitioner"), requesting the substitution of FM Channel 248C2 for 249A at Kalkaska, Michigan. Petitioner also requests the modification of its license for Station WKLT-FM, Channel 249A, Kalkaska, Michigan, to specify operation on Channel 248C2.

2. In support of its proposal, petitioner states that the proposed change for WKLT-FM will make possible an improvement in, as well as an expansion of, existing service to the public. According to petitioner, the proposed upgrade is appropriate for WKLT-FM inasmuch as Kalkaska is near to the larger community of Traverse City, Michigan, and is considered by many as part of the Traverse City market.

3. We believe petitioner's proposal warrants consideration. Channel 248C2 can be allocated to Kalkaska, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 17 kilometers (10.6 miles) north of the community. The site restriction will prevent a conflict with Station WJIM-FM, Channel 248B, Lansing, Michigan. In addition, we shall propose to modify the license of Station WKLT-FM, Channel 249A, to specify operation on Channel 248C2 in accordance with Section 1.420(g) of the Rules. Since the allotment of Channel 248C2 at Kalkaska is within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government is required.

4. In order to provide a wide coverage area station for the Kalkaska, Michigan area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
Community	Present	Proposed
Kalkaska, Michigan	249A	248C2

5. The Commission's authority to institute rule making Proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before December 12, 1986 and reply comments on or before December 29, 1986, and are advised to read the Appendix for the proper Procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Thomas N. Frohock
McKenna, Wilkinson & Kittner
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's* Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex *parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An ex *parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an ex *parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex *parte* Presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-387

Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Germantown, Tennessee)	RM-5413

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1986; Released: October 22, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration a petition for rule making filed by Heart of America Broadcasting ("petitioner") seeking the allotment of Channel 298A to Germantown, Tennessee, as that community's second FM service. Petitioner states its intention to apply for the channel, if allotted.

2. The channel can be allotted to Germantown, Tennessee consistent with the Commission's minimum distance spacing requirements with a site restriction of 5.2 kilometers (3.3 miles) southeast of the community to avoid short spacing to Station KFIN(FM), Channel 300 at Jonesboro, Arkansas.

3. In view of the fact that the proposed allotment could provide a second FM service to Germantown, Tennessee the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Germantown, Tennessee	232A 232A,	298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contacted in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 12, 1986 and reply comments on or before December 29, 1986, and are advised to read the Appendix for the proper procedures. Additioally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Ashton R. Hardy, Esquire
Bradford D. Carey, Esquire
700 Camp Street
New Orleans, LA 70130-3702
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Alloments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission ' s Rules* 46 FR 11549, February 9, 1981.

7. For further information concerning the proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission Proceedings, such as the one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briesf or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-388

Amendment of Section 73.606(b)	RM-5385
Table of Assignments	
Television Broadcast Stations	
(Kenansville, Florida)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1986 Released: October 22, 1986

By the Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Meredith Corporation ("petitioner") requesting the assignment of UHF Television Channel 31 to Kenansville, Florida, as that community's first local television service. Petitioner indicated that it will apply for the channel, if assigned.

2. Kenansville (unlisted) in Osceola County (population 49,287).[1] is located in central Florida approximately 45 miles southeast of Orlando.

3. We are unable to confirm that Kenansville is a community for assignment purposes. Section 307(b) of the Communications Act of 1934, as amended, requires that channel assignments be made to a "community" which has been defined as a geographically identifiable population grouping. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural identification to qualify it as a "community" for assignment purposes. See *Ansley , Alabama* 46 Fed. Reg. 48688 published December 3, 1981, and *Red Rock , Georgia*, 48 Fed. Reg. 36170, published August 9, 1983, In comments to the *Notice* petitioner is requested to submit such information if it desires the requested assignment at Kenansville.

4. We believe that the petitioner's proposal for a first local television service at Kenansville warrants consideration. Channel 31 can be assigned to Kenansville in compliance with the spacing requirements of Section 73.610 if the transmitter site is restricted to 9.6 miles south of the city, to avoid short spacing to Station WMFE-TV (Channel 24), Orlando, Florida.

5. Accordingly, we shall propose to amend the Television Table of Assignments, Section 73.606(b) of the Rules, with respect to the community listed below as follows.

	Channel No.	
City	Present	Proposed
Kenansville, Florida	—	31

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

7. Interested parties may file comments on or before December 12, 1986, and reply comments on or before December 29, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant,as follows.

Henry A. Solomon
Haley, Bader and Potts
2000 M Street, N.W.
Washington, D.C.
(Attorney for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Assignments, Section 73.606(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule ' Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's R u l e s,* 46 Fed. Reg. 11549, published February 9, 1981.

9. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau,(202) 634-6530. However, the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contact are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] Population figures are taken from the 1980 U.S. Census.

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Applications of

RAM COMMUNICATIONS OF MICHIGAN, INC.

For authority to establish an additional facility for one-way Station KQD303 to operate on frequency 158.70 MHz in the Public Land Mobile Service at Flint, Michigan — File No. 22500-CD-P/L-1-85

For authority to relocate one-way Station KQD303 operating on frequency 158.70 MHz in the Public Land Mobile Service at Holly, Michigan, — File No. 23702-CD-P/ML-01-85

and

For Special Temporary Authority to Station KQD303 operating on frequency 158.70 MHz in the Public Land Mobile Service at Holly, Michigan — File No. 20226-CD-ML-08-84

and

KING COMMUNICATIONS, INC.

For a construction permit for a new one-way station to operate on frequency 158.70 MHz in the Public Land Mobile Service at Clio, Michigan — File No. 22403-CD-P/ML- 84

ORDER ON RECONSIDERATION

Adopted: October 16, 1986; Released: October 22, 1986

By the Chief, Common Carrier Bureau:

1. King Communications, Inc. (King) is the licensee of one-way Station KSV935 operating on frequency 158.70 MHz at Saginaw, Michigan. King applied for authority to operate a new facility for Station KSV935 at Clio, Michigan. RAM Communications of Michigan, Inc. (RAM) is the licensee of one-way Station KQD303 located at Holly, Michigan. RAM applied for Special Temporary Authority (STA) and for permanent authority to relocate its Holly facility. It also applied for an additional transmitter at Flint, Michigan. The Ram and King applications are electrically mutual exclusive.

2. King's application, filed on March 15, 1984 and listed on Public Notice on May 2, 1984, was returned on July 23, 1984 as defective by the Mobile Services Division (MSD), because its proposal would cause electrical interference to RAM's existing Holly station. Although RAM was required to accept interference from King's Saginaw facility because the Saginaw facility was licensed before RAM applied for its Holly construction permit, the staff concluded that King's proposal increased the allowable interference. On August 23, 1984, King requested reconsideration and acceptance of its application *nunc pro tunc* as of its original filing date. Responsive pleadings were filed. King also filed a minor amendment to its resubmitted application, reducing RF output power and revising information on transmission line loss to demonstrate that its proposed Clio contour would not increase interference to RAM.

3. RAM's Flint application was filed on March 23, 1985 and was listed on Public Notice on May 8, 1985. King requested dismissal on the ground that grant of RAM's mutually exclusive application during the pendency of its reconsideration request would be improper. Responsive pleadings were filed. RAM's Holly relocation application was filed on June 11, 1985 and listed on Public Notice on August 28, 1985. Previously RAM requested Special Temporary Authority (STA) to operate at the relocated site. King filed a petition to dismiss or deny the application, and responsive pleadings were filed. RAM was granted a 90-day STA on June 25, 1985, which was extended to November 24, 1986. On October 15, 1985, the MSD notified RAM that if King's motions were granted, that its STA would be terminated.

DISCUSSION

4. The pivotal issue is whether King's Clio application was properly returned as defective for failure to demonstrate interference-free operation with RAM's then existing Holly facility. King argues that the application was improperly returned due to circumstances arising out of an improper modification of RAM's Holly facility. King contends that RAM's modification application was mischaracterized as a minor amendment and was erroneously granted without appearing on public notice.[1] King claims that the engineering studies contained in its amended Clio application demonstrate that its proposed facility would cause no increased interference to the service contour of RAM's Holly facility. RAM claims that King's proposed application, even as amended, would increase both the amount and duration of interference to the Holly station beyond that which RAM had agreed to accept.

5. We reject RAM's arguments. The staff's original engineering analysis of the King application and its decision to dismiss that application were based upon the incorrect filing by RAM. *See* note 1, *supra* . King's original application does not exceed the interference contour which RAM has already agreed to accept from King's Saginaw facility. Therefore, we reject RAM's argument that its Holly facility would suffer interference of increased duration as a result of King's proposal. Once RAM agreed to accept interference, it is not protected from subsequent interference-causing proposals, as long as the subsequent interference contours are within the original interference contour that was agreed to be accepted. *See Beep Communications Systems ,Inc* ., Mimeo No.2713, para. 3, released August 11, 1981.

6. Since the staff's decision returning King's Clio application was based upon RAM's incorrect data, we will accept King's Clio application *nunc pro tunc* as the March 15, 1984, original filing date. King's Clio application was listed on Public Notice on May 2, 1984. The last day to file mutually exclusive applications was July 2, 1984. RAM's Flint application filed on March 23, 1985 and its

Holly application filed June 11, 1985, were cut-off by King's earlier application. Therefore, RAM's applications are dismissed pursuant to the cut-off provisions of Section 22.31(b) of the Rules, and King's application, as amended, will be granted.

7. We further reject King's argument that RAM's STA to relocate the Holly facility was improperly granted because of mutual exclusivity with King's Clio application. RAM lost its lease of its Holly antenna site early in June, 1985, and its STA request to relocate was granted to avoid inconvenience to RAM's customers resulting from interruption of service. However, RAM was on notice that its STA would be terminated upon grant of King's Clio application. Pending Commission action on King's petition for reconsideration, continued service to the public of RAM's Station KQD303 under STA did not prejudice King. Since we are granting King's Clio application, RAM will have to cease operations at its relocated Holly facility. Rather than having RAM close down its facilities immediately, we will permit RAM to continue its operations pursuant to STA until King completes construction, commences operation of its Clio facility, and files such notification on FCC Form 489.[2]

8. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by King Communications, Inc., File No. 22403-CD-P/ML-84, IS GRANTED, and the application IS ACCEPTED FOR FILING as of March 15, 1984.

9. IT IS FURTHER ORDERED, That the application of King Communications, Inc., as amended, File No. 22403-CD-P/ML-84 IS GRANTED.

10. IT IS FURTHER ORDERED, That the applications of RAM Communications of Michigan, Inc., File Nos. 22500-CD-P/L-1-85 and 23702-CD-P/ML-01-85, ARE DISMISSED AS DEFECTIVE.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] On January 7, 1983, RAM filed a "minor amendment" that increased the interference contour overlapping King's Saginaw service contour by five miles. The MSD concluded that this was not a minor amendement and rescinded its prior grant on November 14, 1984.

[2] At the same time King submits its FCC Form 489, it is required to submit a copy of that form to RAM's counsel. In the interim, RAM may reengineer its Holly system to eliminate the interference or to relocate to where there is no interference.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Complaint and Petition for Rulemaking Concerning Advertising of Terminal Equipment Registered under Part 68 of the Commission's Rules filed by the Telecommunications Research and Action Center — RM-4865

Memorandum Opinion and Order

Adopted October 6, 1986 **Released October 21, 1986**

By the Commission:

1. Before the Commission is an application for review filed by Telecommunications Research and Action Center (TRAC) of *Memorandum Opinion and Order*, Mimeo No. 3028, released March 10, 1986, in which the Chief, Common Carrier Bureau denied a complaint and petition for rulemaking filed by TRAC. Comments in support have been filed by the American Telephone and Telegraph Co. (AT&T). For the reasons stated below, we deny the application for review.

Background

2. Part 68 of the Commission's rules provides the technical and procedural standards under which direct electrical connection of customer-provided telephone equipment, systems and protective apparatus may be made to the nationwide telephone network. Section 68.1 of the Rules, 47 C.F.R. § 68.1, states that the purpose of Part 68 is to provide for uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment thereto. Thus, compliance with Part 68 assures telephone carriers that connection of customer provided terminal equipment will not harm the network, and assures equipment manufacturers and consumers that such connection will be permitted for a properly registered terminal device. Part 68 does not set standards for equipment quality or performance. *First Report and Order*, Docket No. 19528, 56 F.C.C.2d 593 (1975); *Second Report and Order*, Docket No. 19528, 58 F.C.C. 2d 736 (1976), *aff'd sub nom. North Carolina Utilities Commisson v. F.C.C., 552 F.2d 1036 (4th Cir. 1977), cert. denied* 434 U.S. 874 (1977). Indeed, section 2.927(c) of the Rules, 47 C.F.R. § 2.927(c), provides that "[n]o person shall, in any advertising matter, use or make reference in a deceptive or misleading manner or convey the impression that such equipment authorization reflects more than a determination that the device or product is capable of compliance." This section is made applicable to Part 68 terminal equipment registrations by Section 2.1300 of the rules, 47 C.F.R. § 2.1300.

3. In its complaint and petition for rulemaking, TRAC alleged that telephone terminal equipment manufacturers were engaging in deceptive advertising prohibited by Section 2.927(c) of the rules by advertising that their terminal equipment was "FCC Approved" or "U.S. Government Approved". Statements to this effect were placed on equipment packaging or advertising brochures. According to TRAC, some manufacturers displayed these statements in a visually prominent fashion, as part of an official looking ribbon or seal. TRAC argued that these statements inherently conveyed the meaning or impression that the FCC had evaluated the equipment and concluded that it was superior in quality to other terminal equipment that did not bear the words "FCC-Approved", and/or that the equipment would be suitable in quality and utility for the consumer. TRAC requested that the Commission adopt a nationwide uniform rule on advertising equipment registration, and order manufacturers to terminate the allegedly deceptive advertising practices, repackage and relabel terminal equipment and distribute corrective advertising.

4. The Bureau found that the Commission's own rules refer to a Part 68 registration as an approval, *i . e.* an evaluation of equipment test data, and concluded that it could not find statements claiming that the equipment had been approved by this agency inaccurate. *See* Sections 68.200 and 68.214(b) of the rules, 47 C.F.R. §§ 68.200 and 68.214(b). The Bureau stated that it was "conceivable .that the statement "FCC-Approved" could be interpreted by some consumers to install an imprimatur of quality on the product", and that the Commission could prevent any possible misinterpretation by adopting standards for advertisements referring to Part 68 registration. However, the Bureau stated that it was reluctant to impose the costs of such regulation on manufacturers and consumers absent a showing that some deception was occurring. The Bureau found that TRAC, by its own admission, had failed to submit any evidence that the advertisements in question were actually deceiving or misleading consumers. The Bureau found that TRAC had failed to show sufficient reason for the Commission to invoke rulemaking and that the advertisements in question did not violate the standards of Section 2.927(c). It therefore denied TRAC's complaint and petition for rulemaking.

Contentions

5. In its application for review, TRAC states that issue before the Commission is whether statements that are clearly designed with an intent to mislead or, at a minimum, are capable or conveying an erroneous impression, will be tolerated, not whether the advertisements are actually deceiving the public.[1] It calls to the Commission's attention that part of Section 2.927(c) which states that no person shall "convey the impression" that an equipment authorization reflects more than that the equipment has been shown to be capable of compliance with relevant technical standards. It argues that this standard is different and less rigorous than the "deceptive or misleading" prohibition of that rule section, in that an individual receiving the "conveyed impression" need not be deceived or act on the misimpression for the language of the rule to be violated. TRAC claims that the Bureau ignored this part of Section 2.927(c), and instead required proof of actual deception occurring in order to find a violation.

6. Furthermore, the Bureau's finding that the advertisements have an accurate meaning in referring to Part 68 registration does not excuse the manufacturers' advertisements, states TRAC. The actual meaning of the word "approval" is not relevant to ascertaining a violation of Section 2.927(c), states TRAC. Rather, it is the imprecise nature of its use which runs afoul of the standards of that rule section in this instance. TRAC also argues that no costs would be imposed on manufacturers or the public by

simply prohibiting use of the phrase "FCC-Approved". Moreover, states TRAC, the language of Section 2.927(c) is mandatory and does not permit a cost benefit analysis as a precondition of enforcement.

7. AT&T states that consumers are unlikely to appreciate the distinction that a Part 68 registration signifies only that the equipment complies with technical harm standards and does not specifically denote equipment quality. If the Bureau is correct that some consumers could consider the term "FCC-Approved" to relate to equipment quality, then, in substance, according to AT&T, the Bureau has already in fact found a violation of Section 2.927(c). AT&T states that the Commission should prohibit the potential misinterpretation noted by the Bureau. AT&T further argues that no additional costs would be incurred by manufacturers not stating that their equipment has been approved by this agency. Only minimal costs would be entailed in changes to promotional materials with respect to existing equipment.

Discussion

8. We are unpersuaded by TRAC's contention that a violation of Section 2.927(c) should be found because it is conceivable that an incorrect interpretation could be given to the statement "FCC-Approved", or because such statement is capable of an incorrect interpretation. These criteria are so vague as to render almost any statement concerning a Part 68 registration suspect under Section 2.927(c). The Bureau's statement that it was conceivable that some consumers might interpret the statement "FCC-Approved" to relate to equipment quality, does not, therefore, impeach its conclusion of no violation of Section 2.927(c). Accordingly, we cannot fault the Bureau for requiring a greater potential for deception or conveying an incorrect impression before finding a violation of the rules and imposing sanctions or corrective action.

9. Moreover, we find no error in the Bureau's analysis of the advertisements in question. These advertisements merely state –accurately – that the equipment is FCC or U.S. Government approved. *Order*, para. 9. Contrary to TRAC's conclusion, these statements either by themselves or in the context in which they appear on equipment packaging do not carry the meaning, convey the impression, state or imply that this agency has endorsed equipment quality or determined that it is suitable for the consumers purposes sufficient to demonstrate a violation of Section 2.927(c). Nor do we consider these advertisements unnacceptably imprecise because they do not explain in detail the meaning of Part 68 registration. No justification has been presented that these advertisements were made with any intent to deceive or mislead. TRAC is attempting to impart to these statements that this agency has approved terminal equipment more meaning than can be fairly attributed to them. In other words, these advertisements themselves do not raise a significant issue of a violation of Section 2.927(c).

10. While the Commission probably would find a violation of Section 2.927(c) based on a clearly deceptive, misleading, or untrue characterization of a Part 68 registration even without evidence of detrimental reliance by consumers, that is not the case before us. As indicated, the advertisements brought to our attention by TRAC do not raise a substantial question of a violation of Section 2.927(c). If and when the Commission is presented with manufacturer statements or advertisements which in themselves are deceptive or misleading, and no evidence of consumer injury or deception is submitted, the Commission will then be in a position to decide if such other evidence should be additionally required under Commission policy in order to find a violation of Section 2.927(c).

11. Moreover, we are not persuaded that the Bureau concluded that extrinsic evidence of consumer deception was essential to a violation. The Bureau analyzed the content of the advertisements in question and found that they did not contain any inaccurate representation regarding Part 68 registration. *Order*, para. 9. While the Bureau did not assign a precise weight to this factor or to the additional factor that TRAC had failed to identify or demonstrate any consumer complaints, there is no statement that the absence of consumer complaints was the sole basis of the Bureau's decision. Nor was there any finding that evidence of consumer deception is essential in order to find a violation of Section 2.927(c). Thus, it appears that the Bureau's decision was based on both an analysis of the advertisements and the fact that no evidence of consumer complaints or deception had been presented. No convincing arguments have been presented that this constituted an incorrect application of Section 2.927(c).

12. Furthermore, the absence of evidence of consumer deception, complaints, or injury is not irrelevant to an evaluation of TRAC's complaint. Even if such evidence is not essential to a violation, as TRAC principally urges before the Commission, its tota! absence as in this case tends to support the conclusion that the advertisments do not convey, nor have the capability of conveying, an incorrect meaning. Thus, we find that TRAC's failure to present any evidence of an actual problem of deception occurring because of the advertisements in question is a factor which should be accorded weight in determining whether a violation has occured or the relief requested by the parties is warranted, *i.e.* Commission directives as to what advertising is acceptable and corrective advertising. We do not believe therefore that the Bureau's consideration of this factor was erroneous.

13. Finally, the Bureau did not state in its decision that a cost benefit analysis was a precondition to enforcement of Section 2.927(c) nor did it decline to enforce that section based on such an analysis. It merely found that it was reluctant to promulgate standards for advertisements concerning Part 68 registrations, and to impose any consequent costs on manufacturers and the public, in the absence of evidence that the type of advertisements in question were actually causing consumer deception. With respect to the claim that no additional costs would be incurred either by manufacturers or consumers in simply prohibiting manufacturers from stating that their equipment is FCC approved, it has not been shown that alternative Commission mandated statements or explanations would not entail some additional costs. AT&T's statement that modifying existing packaging and advertisements would involve only nominal costs is completely unsupported.

14. In view of the foregoing, we find that TRAC has failed to show that the Bureau erred in its determination that the advertisements in question do not transgress the strictures of Section 2.927(c).[2]

15. Accordingly, IT IS ORDERED, That the application for review filed by the Telecommunications Research Action Center IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] TRAC states that it seeks review only of the Bureau's denial of its complaint, not the Bureau's denial of its request for rulemaking.

[2] In *Cosmo Communications ,Inc* ., 51 Fed. Reg. 34093 September 25, 1986, Cosmo Communications, Inc. (Cosmo), a telephone manufacturer named in the complaint before the Bureau, entered into a consent agreement with the Federal Trade Commission (FTC) concerning advertisements for Cosmo's pushbutton pulse telephones. (Pushbotton pulse telephones generate pulses like rotory dial telephones, not tones of the type generated by touch-tone telephones.) Cosmo agreed to not indicate or state in advertisements that its touch pulse telephones generate tones. The FTC action does not address the claim made by TRAC against Cosmo before the Bureau that the statement "FCC-Approved" is deceptive or misleading in violation of Section 2.927(c) of the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN INFORMATION TECHNOLOGIES, INC.

BELLSOUTH CORPORATION
File Nos. ENF 84-33, 84-38, 84-60

SOUTHWESTERN BELL CORPORATION

BELL ATLANTIC TELEPHONE COMPANIES

PACIFIC BELL AND NEVADA BELL

Petitions for Waiver of Section 64.702
of the Commission's Rules and Regulations)
to Enable Certain Bell Operating
Companies to Offer Digital NCTE Without
Structural Separation

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 **Released: October 23, 1986**

By the Commission:

I. Introduction

1. On September 4, 1985, the Chief of the Common Carrier Bureau (the Bureau), acting under delegated authority,[1] adopted an order (the *Waiver Order*),[2] conditionally granting the petitions of three former Bell Operating Companies (BOCs) for limited interim waivers (the Waivers) of Section 64.702 of our rules. Pursuant to the Waivers, the three petitioning BOCs are permitted to supply certain digital network channel terminating equipment (NCTE)[3] on a structurally unseparated basis, provided they maintain separate accounts for, and file accounting plans sufficient to ensure that ratepayers do not incur expenses related to, their unseparated provision of NCTE. In addition, the terms of the Waivers were limited to an interim period pending resolution of the NCTE issues raised in the Third Computer Inquiry proceeding (*Computer III*).[4]

2. The Independent Data Communications Manufacturers Association, Inc. (IDCMA) has filed an application (the Application) for review of the *Waiver Order*. For the reasons stated below, we deny the Application and extend the waivers until resolution of general NCTE regulatory issues in the *BOC Structural Relief* proceeding.

3. Additionally, we have before us similar petitions filed by the Bell Atlantic Telephone Companies, and Pacific Bell and Nevada Bell, for waiver of the same rules to permit them to offer digital NCTE on a structurally unseparated basis within their basic service area. For the reasons stated below, we also grant these petitions, subject to terms and conditions similar to those which govern Ameritech, BellSouth, and Southwestern Bell.

II. Background

4. In the Second Computer Inquiry proceeding (*Computer II*), we required that AT&T provide customer premises equipment (CPE) and enhanced services on an unregulated basis through a corporate affiliate that would be fully separated from its basic service operations.[5] We established this structural separation requirement because of our concern that AT&T could use its market power with respect to basic telecommunications services to engage in anticompetitive discrimination against its CPE competitors or cross-subsidization of its CPE operations through improper shifting of costs to its regulated basic service operations. Later, in the *NCTE Order*,[6] we decided to treat digital NCTE as CPE for purposes of our Rules, with the result that our structural separation requirements were applied to AT&T's provision of NCTE. In that order, we rejected arguments that because NTCE is placed in the stream of the transmission circuit rather than at its end, it should be treated as network equipment and be supplied exclusively by carriers on a regulated basis. In the *NCTE Reconsideration Order*, however, we recognized that customer inconvenience and dislocation could result if customers were unable to obtain NCTE and related maintenance services directly from the carriers. Nevertheless, we concluded that whether relief from the structural separation requirements for AT&T and BOC provision of NCTE was warranted would best be resolved in specific cases. Accordingly, we suggested that carriers could request waivers of the structural separation rules based on, *inter alia*, "customer inconvenience and dislocations due to inability to obtain NCTE and related maintenance service directly from the regulated carrier."[7]

5. In 1982, at the same time that we were considering the regulatory classification of NCTE as CPE in the *NCTE Order* proceeding, the Department of Justice and AT&T agreed to settle an antitrust complaint against AT&T by entering a consent decree, which with some modifications was adopted by the United States District Court for the District of Columbia (*Modification of Final Judgment* or *MFJ*).[8] The *MFJ* required AT&T to divest itself of most of the operations of the BOCs, effective January 1, 1984. As part of the divestiture, AT&T retained its CPE business as well as its research and manufacturing facilities; but, under the terms of the decree, the BOCs were allowed to market, but not manufacture, CPE. In the Plan of Reorganization filed by AT&T pursuant to the *MFJ* and accepted by the divestiture court, the BOCs retained the existing embedded base of NCTE. Shortly before the AT&T divestiture occurred, in the *BOC Separation Order*, we concluded that our structural separation requirements should apply to the divested BOCs as well as AT&T.[9] Consequently, after divestiture we required the BOCs to comply with our structural separation requirements if they supplied NCTE. However, when we ordered detariffing of the embedded base of CPE, we deferred both the detariffing of, and the application of structural separation to, BOC offerings of embedded NCTE. Furthermore, the Bureau granted waivers of the structural separation rules to Ameritech, Bell Atlantic, BellSouth, Northwestern Bell, and NYNEX, permitting those BOCs to provide and support, on an unseparated basis, "new" (non-embedded) digital NCTE placed into service by June 30, 1984.[10] In the *Computer III Order*,[11] we deferred a decision on application of the structural separation requirements to BOC provision of NCTE generally to our *BOC Structural Relief* proceeding,[12] in which we are considering whether to

eliminate those requirements and replace them with nonstructural safeguards for BOC provision of all types of CPE.

III. Waiver Order

6. In the *Waiver Order*, the Bureau granted the petitions of Ameritech, BellSouth, and Southwestern Bell to permit them to provide, on an unseparated basis, digital NCTE associated with their provision of DDS and DS-1 digital services.[13] The waivers were granted on an interim basis pending resolution of the NCTE issues raised in *Computer III*, which were addressed to general BOC provision of all types of digital NCTE. The *Waiver Order* did not purport to decide the issues raised in the *Computer III* proceeding, but rather, granted the interim waivers based on a showing of customer inconvenience resulting from NCTE not being available from the BOC, and inadequate supply and maintenance of NCTE in the marketplace.

7. The Bureau found that the immediate needs of consumers expressed by the BOCs militated against deferring their requests until *Computer III* was decided. The Bureau also determined that anticompetitive abuse could be prevented through application of nonstructural safeguards, such as the network disclosure rules established in *Computer II*, the requirement that BOCs maintain central operations groups (COGs) to ensure nondiscriminatory interconnection of CPE, and the availability of Commission complaint procedures in the event that competitors detect signs of anticompetitive discrimination. In addition, the Bureau found that the BOCs' ability to cross-subsidize their competitive NCTE activities with revenues from their regulated operations was greatly lessened by the fact that the BOCs are prohibited by the *MFJ* from manufacturing CPE, including NCTE, and therefore must purchase their NCTE from independent manufacturers at readily ascertainable market prices. As additional safeguards, the Bureau required each BOC to keep separate accounts for NCTE provided under the Waivers and also to file an accounting plan describing the methodology employed to assign all NCTE costs to that activity.[14]

IV. Application for Review and Responsive Pleadings

A. Application for Review and Reply

8. On October 11, 1985, IDCMA filed an application for Commission review of the *Waiver Order*. Pursuant to our rules,[15] IDCMA alleges that the following factors warrant our review: (a) the Bureau's action is in conflict with established Commission policy; and (b) the Bureau made an erroneous finding on an important or material question of fact. In its Reply to Oppositions, IDCMA summarizes and reiterates the assertions made in its Application.

1. Conflict With Established Commission Policy

9. IDCMA presents two contentions in arguing that the *Waiver Order* conflicts with established Commission policy. First, it argues that the the Waivers contravene previous factual and policy determinations by the Commission. Second, IDCMA argues that the Bureau did not properly utilize the *Computer III* proceeding as the vehicle for resolving the NCTE issues addressed in the *Waiver Order*.

10. On the first point, IDCMA contends that the *Waiver Order* conflicts with our policies because it fails to satisfy the standards for waiver set out in the *NCTE Order* and the *NCTE Reconsideration Order*, particularly the "customer inconvenience" standard. IDCMA argues that the evidence it has submitted to demonstrate that such inconvenience does not exist should be accepted over the contrary evidence presented by the BOCs. IDCMA further claims that when the *NCTE Order* was issued, it was well understood that its impact would be to apply the structural separation requirements to provision of NCTE by the BOCs.

11. Moreover, IDCMA claims that in the *Waiver Order*, the Bureau misconstrued the purpose of COGS and network disclosure rules established in the *BOC Separation Order*. IDCMA argues that the *BOC Separation Order* stated that these two nonstructural safeguards complement rather than replace structural separation in controlling potential anticompetitive conduct.

12. On its second point, IDCMA asserts that the Bureau's grant of the Waiver was "particularly inappropriate" because we had recently commenced the *Computer III* rulemaking proceeding to review "essentially the same issues once again."[16] The only proper course, according to IDCMA, would have been to maintain the status quo pending resolution of that proceeding.

2. Erroneous Findings of Fact

13. IDCMA also claims that in the *Waiver Order*, the Bureau erred on important matters of fact regarding both marketplace and technical aspects of NCTE. According to IDCMA, the principal error in the *Waiver Order* is its finding that our structural separation requirements, as applied to NCTE, cause customer inconvenience and dislocation. IDCMA points to a number of factors as indicating that: (a) competitive NCTE is readily available from multiple sources; (b) the principal cause for delay is customers' inability to obtain transmission circuits in a timely fashion rather than their inability to obtain NCTE; and (c) competitive NCTE vendors possess the requisite expertise to install and repair such equipment.[17] IDCMA further argues that technical references in the *Waiver Order* concerning loop instability are incorrect.

14. Finally, IDCMA claims that in the *Waiver Order*, the Bureau utilized its own unsupported assumptions and assertions. In particular, it criticizes reliance in the *Waiver Order* on statements in the *Computer III Notice* regarding NCTE supply and customer problems, contending that such statements are not factually supported. IDCMA also disputes the Bureau's finding that NCTE suppliers are failing to serve the market fully and competently, claiming that such a finding does not reflect the actual situation.

B. Oppositions

15. On October 28, 1985, Ameritech, Southwestern Bell, BellSouth,[18] and Verilink Corporation (Verilink) filed Oppositions to the Application.

1. Conflict with Established Commission Policy

16. The parties filing Oppositions argue that the *Waiver Order* is fully consistent with established Commission policies. For example, Southwestern Bell contends that the Bureau imposed adequate nonstructural safeguards to prevent anticompetitive abuses and cross-subsidization, which fulfill the purpose of structural separation under *Computer II*. Southwestern Bell states that IDCMA's reliance on the *BOC Separation Order*, which we adopted in 1983, for defining current Commission policy on structural separation and nonstructural safeguards is misplaced, instead arguing that the *AT & T Structural Relief Order*,[19] which we adopted in 1985, is the latest relevant decision regarding the effectiveness of nonstructural safeguards versus the effectiveness of structural separation to prevent anticompetitive conduct. According to Southwestern Bell, the

Waiver Order is consistent with this later decision, which recognizes the effectiveness of nonstructural safeguards as an alternative to structural separation.[20]

17. Similarly, both Southwestern Bell and Verilink oppose IDCMA's assertion that it was inappropriate for the Bureau to grant the Waivers in light of the pendency of the *Computer III* proceeding. Verilink notes that the Waivers were to be in effect only for an interim period, until resolution of the NCTE issues in *Computer III*.[21] Southwestern Bell contends that grant of the Waivers was appropriately based on both the immediate needs of NCTE customers resulting from the inadequate supply of NCTE and the availability of nonstructural safeguards sufficient to prevent anticompetitive discrimination and cross-subsidization.[22]

2. Erroneous Findings of Fact

18. The parties filing Oppositions also support the Bureau's finding that customer inconvenience and dislocation existed as a result of the BOCs' not offering NCTE on an unseparated basis. Ameritech, for example, states that several subscribers had contacted it complaining of precisely such inconvenience. Ameritech also challenges IDCMA's "refutation" of one of Ameritech's specific examples of customer inconvenience.[23] Southwestern Bell, BellSouth, and Verilink all cite similar specific examples and also rely on their general knowledge of the marketplace for their assertions of customer inconvenience.[24]

C. Discussion

19. Section 1.115(b)(2) of our Rules describes factors that warrant Commission review of Bureau decisions pursuant to delegated authority.[25] An application for review must specify the relevant factors with particularity. As noted above, in its Application, IDCMA identifies two factors allegedly supporting reversal of the *Waiver Order* : that the Bureau's decision to grant the Waivers (a) conflicts with our established policy, and (b) relies on an erroneous finding as to an important or material question of fact. For the reasons stated below, we find both assertions to be without merit and therefore deny the Application.

1. Conflict With Established Commission Policy

20. IDCMA's allegation that the Bureau's decision in the *Waiver Order* conflicts with established Commission policy rests on two grounds: that grant of the waivers contravenes previous factual and policy determinations by the Commission, and that the Bureau did not properly defer action on the waiver request to the *Computer III* proceeding, which was addressing issues regarding BOC provision of NCTE. On the first point, IDCMA argues that the Bureau's action contravenes previous Commission findings in the *NCTE Order*, in which we classified NCTE as CPE for purposes of our *Computer II* rules. However, the Bureau neither questioned nor changed the classification of NCTE as CPE, and the underlying policy in *Computer II* of preventing anticompetitive conduct was preserved through application of nonstructural safeguards. Furthermore, as IDCMA acknowledges, in the *NCTE Order* and *NCTE Reconsideration Order* we explicitly addressed the possibility that under certain circumstances these rules would be waived. In the *NCTE Reconsideration Order* we stated that "customer inconvenience and dislocations due to inability to obtain NCTE and related maintenance service directly from the regulated carrier"[26] could justify a waiver. The Bureau determined that such inconvenience and dislocation existed, and, as we indicate below, we agree with that conclusion. Thus, we find that the Bureau's grant of the Waivers is consistent with both the *NCTE Order* and the *NCTE Reconsideration Order*.

21. On the second point, concerning the *Computer III* proceeding, we note that the Waivers are limited and temporary in nature in that they apply only to limited categories of NCTE being offered by certain carriers and were to be effective only until resolution of the more encompassing BOC NCTE issues in that proceeding. In *Computer III*, we were examining the entire regulatory structure applicable to provision of NCTE by AT&T and the BOCs. The focus of that proceeding was on whether NCTE, or certain NCTE functions, should continue to be classified as CPE or instead should be treated as part of the network if provided by carriers; whether we should continue to apply our structural separation requirements to NCTE when it is supplied by AT&T and the BOCs if we continue to treat NCTE as CPE generally; and, if we were to remove the structural separation requirements, whether carriers should be permitted to provide NCTE as a basic tariffed offering on either a bundled or unbundled basis, or on an unregulated basis subject to nonstructural safeguards.

22. Thus, the NCTE issues raised in *Computer III* went far beyond the limited issue addressed in the *Waiver Order*, *i.e.*, whether specific carriers temporarily should be permitted to offer certain limited types of NCTE on an unseparated basis subject to certain nonstructural safeguards. The grant of the Waivers was conditioned on resolution of the more fundamental NCTE issues under consideration in *Computer III* and in no way compromised the affected BOCs' future provision of NCTE under any of the regulatory schemes proposed in the *Computer III Notice*. Under these circumstances, the *Waiver Order* did not foreclose our consideration of any of the *Computer III* issues. Indeed, the *Waiver Order* maintained the fundamental treatment of NCTE as CPE, which we had established in the *NCTE Order* and which we recently reaffirmed in the *Computer III Order*.

23. Presented with the specific needs of NCTE customers caused by inadequate supply and maintenance of NCTE, the Bureau maintained the basic applicable regulatory structure, but allowed the petitioning carriers to provide specific types of NCTE subject to nonstructural safeguards that ensure against anticompetitive conduct. The Waivers do not impose any new regulatory structure on the provision of NCTE, which may be competitively supplied, free of structural separation, by non-carriers, AT&T, and the independent telephone companies.[27] Furthermore, the Waivers maintain the separation requirements for provision by the BOCs of other types of NCTE not covered by the Waivers, for which no showing of customer inconvenience or dislocation has been made.

24. Moreover, a failure by the Bureau to consider the waiver requests merely because *Computer III* was addressing general NCTE issues itself might have been considered to be arbitrary or capricious in view of the serious allegations of customer inconvenience and dislocation advanced in the petitions. Our administrative procedures make available a process by which justified waivers of specific regulations may be obtained, and our rules explicitly provide for such waivers.[28] As the Court of Appeals for the District of Columbia Circuit has stated in this context: "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve feature for consideration of an application for exemption based on special circumstances."[29] Hav-

ing found that such special circumstances existed in the cases presented by the waiver petitions, the Bureau acted properly in granting the Waivers.

2. Erroneous Findings of Fact

25. In the Application, IDCMA alleges that the Bureau made a number of errors on matters of fact, both as to questions of customer inconvenience and dislocation and as to technical aspects of NCTE. While IDCMA challenges a number of factual findings in the *Waiver Order* concerning customer inconvenience, the record presented demonstrates the existence of such inconvenience and dislocation, which we indicated in the *NCTE Reconsideration Order* would provide a basis for granting waivers of our structural separation requirements for NCTE. The Bureau has expertise in this matter and applied that expertise appropriately in considering the claims and assertions made in the record on the question of customer inconvenience. Furthermore, the Oppositions underscore the scope of these problems by describing examples that support the Bureau's finding, with which we agree, that significant customer inconvenience and dislocation did exist and would continue to exist but for the *Waiver Order*. Therefore, we see no reason in this context to address specific technical issues, such as whether particular digital transmission lines are stable or unstable, as they are not material to the Bureau's grant of the Waivers. We find that customer inconvenience and dislocation alone provides a sufficient base for grant of the Waivers.

V. Extension of the Waiver Order

26. The Bureau granted the Waivers pending resolution of issues concerning BOC provision of NCTE in *Computer III*. In the recently released *Computer III Order*, we affirmed our treatment of NCTE as CPE and deferred issues concerning BOC provision of NCTE to the *BOC Structural Relief* proceeding, in which we are considering whether to permit BOC provision of CPE (including NCTE) on an unseparated basis. Therefore, we modify the terms of the *Waiver Order* to continue the granted Waivers until the effective date of a decision concerning NCTE in the *BOC Structural Relief* proceeding.

VI. Additional Petitions for Waiver

A. Petitions

27. On January 21, 1986, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for an interim waiver of the same rules that are the subject of the Waivers. Bell Atlantic requested the waiver to provide digital NCTE used in connection with DS-1, DDS, and DCS digital services[30] on a structurally unseparated basis until resolution of the NCTE issues in *Computer III*. Bell Atlantic states that it is increasingly experiencing instances of customer dislocation and inconvenience caused by faulty installation or maintenance of digital NCTE associated with these services and that many customers have requested that the equipment be provided with the associated service. Bell Atlantic elaborates on the problems some of its customers have experienced in Appendix A to the petition. Verilink Corporation filed comments in support of Bell Atlantic's petition, the substance of which was a copy of their Opposition to IDCMA's Application for Review, *supra*.

28. IDCMA filed comments opposing Bell Atlantic's petition, stating that the NCTE issue should be resolved in *Computer III* and its (IDCMA's) Application for Review of the Waivers before new waiver petitions are considered. Additionally, IDCMA asserts that Bell Atlantic has not presented any compelling reason why it cannot await the outcome of *Computer III*, and disagrees generally with the persuasiveness of Bell Atlantic's claims of customer dislocation and inconvenience.

29. On February 12, 1986, Pacific Bell and Nevada Bell (Pacific) filed a similar petition for an interim waiver of the same rules and under the same conditions to permit unseparated provision of digital NCTE associated with DS-1 and DDS services. Pacific states that its customers also are experiencing the difficulties identified by Ameritech, BellSouth, Southwestern Bell, and Bell Atlantic. Pacific attached to its petition six letters expressing support for its provision of digital NCTE on an unseparated basis.

B. Discussion

30. Bell Atlantic and Pacific both have established on the record significant customer inconvenience and dislocation caused by applicability of the structural separation requirements to their provision of digital NCTE; and, therefore, we will grant their petitions for waiver, subject to nonstructural safeguards similar to those that apply to the Waivers to prevent any possibility of anticompetitive abuse. Bell Atlantic has requested that its waiver include digital NCTE associated with DCS digital service because such NCTE is identical to that provided for DDS service and because Bell Atlantic is experiencing the same problems with NCTE for DCS service as for DDS service. No party has made any showing that different considerations should apply to NCTE used for DCS service. Accordingly, grant of Bell Atlantic's petition will include such digital NCTE.

31. We find IDCMA's Opposition to the Bell Atlantic petition to be unpersuasive for many of the same reasons we are denying IDCMA's Application for Review. Grant of these waivers does not change our previous determination that NCTE is CPE that may be provided by any vendor in the competitive marketplace. The two petitioners have made showings of customer dislocation and inconvenience that under the *NCTE Reconsideration Order* provide a sufficient basis for granting such waivers. Furthermore, grant of these waivers does not foreclose any decision concerning NCTE we may reach in either the *Computer III Supplemental Notice* or in the *BOC Structural Relief* proceeding.

32. Under the terms of the waivers we grant today, Bell Atlantic and Pacific are subject to the network disclosure rules, COG requirements, and complaint procedures applied in the *Waiver Order*. In addition, we will require Bell Atlantic and Pacific to keep separate accounts for the provision of digital NCTE subject to the waivers. Also, Bell Atlantic and Pacific Bell are required to file, within 30 days of the release of this *Order*, a cost allocation plan consistent with either of the cost allocation procedures proposed in our *Joint Cost Notice*.[31] This will ensure that ratepayers do not subsidize provision of the digital NCTE that is supplied pursuant to these waivers. The waivers granted are interim, to continue in force until the effective date of a decision concerning NCTE in the *BOC Structural Relief* proceeding.

VII. Ordering Clauses

33. Accordingly, IT IS ORDERED, That the Motion for Acceptance of Late-filed Pleading of BellSouth Corporation in this proceeding is hereby GRANTED.

34. IT IS FURTHER ORDERED, That pursuant to Sections 1, 4(i), 4(j), 5(c)(4)-(6), 201-05, 218, and 303(r) of the Communications Act of of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c)(4)-(6), 201-05, 218, and 303(r), and Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, IDCMA's Application For Review of the Common Carrier Bureau's grant of limited waivers of Section 64.702 of our Rules, 47 C.F.R. §64.702, to American Information Technologies, Inc., BellSouth Corporation, and Southwestern Bell Corporation, for provision of NCTE associated with provision of DDS and DS-1 services is hereby DENIED.

35. IT IS FURTHER ORDERED, That the Waivers, which are referred to in paragraph 34, *supra*, are EXTENDED until a decision concerning the regulatory treatment of BOC provision of NCTE in CC Docket No. 86-79 has been released and become effective.

36. IT IS FURTHER ORDERED, That the petitions for waiver of Section 64.702 of our Rules, 47 CFR §64.702, filed by the Bell Atlantic Telephone Companies, for provision of NCTE associated with DDS, DCS, and DS-1 services, and by Pacific Bell and Nevada Bell, for provision of NCTE associated with DDS and DS-1 services, ARE GRANTED to the extent, and subject to the conditions, specified herein.

37. IT IS FURTHER ORDERED, That the waivers granted in paragraph 36, *supra*, shall continue in effect until a decision concerning the regulatory treatment of BOC provision of NCTE in CC Docket No. 86-79 has been released and become effective.

38. IT IS FURTHER ORDERED, That the Bell Atlantic Telephone Companies, and Pacific Bell and Nevada Bell, shall file cost allocation plans as specified in paragraph 32, *supra*, within 30 days of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

[1] 47 C.F.R. §0.291 (1985).

[2] American Information Technologies, Inc., BellSouth Corporation, Southwestern Bell Corporation, Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Enable Certain Bell Operating Companies to Offer Digital NCTE Without Structural Separation, *Memorandum Opinion and Order*, File Nos. ENF 84-33, 84-38, 84-60, (released September 11, 1985, Common Carrier Bureau).

[3] NCTE is a generic term for digital devices located on customers' premises that provide an interface between the network and terminal equipment and perform functions necessary for using a transmission channel for digital communications. NCTE functions include, but are not limited to, circuit termination, signal conditioning, remote loopback and other testing, multiplexing, and electrical surge protection.

[4] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Notice of Proposed Rulemaking*, CC Docket 85-229, FCC 85-397, 50 Fed. Reg. 33581 (August 20, 1985); *Report and Order*, FCC 86-252 (released June 16, 1986) (*Computer III Order*); *Computer III Supplemental Notice of Proposed Rulemaking*, FCC 86-253 (released June 16, 1986) (*Supplemental Notice*).

[5] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (1980), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff ' d sub nom . Computer and Communications Indus . Ass ' n v . FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert . denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984). In the *Final Decision*, the structural separation requirements applied to both AT&T and GTE, but on reconsideration we concluded that the costs of the requirements to GTE outweighed their benefits and therefore applied the structural separation requirements solely to AT&T.

[6] Amendment of Part 68 of the Commission's Rules, *Third Notice of Proposed Rulemaking*, 94 FCC 2d 5 (1983) (*NCTE Order*), *recon . denied*, FCC 84-145 (released April 27, 1984) (*NCTE Reconsideration Order*).

[7] *NCTE Reconsideration Order*, supra note 6, at para. 17.

[8] *United States v . American Tel . & Tel . Co .*, 552 F. Supp. 131 (D.D.C. 1982), *aff ' d sub nom . Maryland v . United States*, 460 U.S. 1001 (1983).

[9] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket 83-115, *Report and Order*, 95 FCC 2d 1117 (1984) (*BOC Separation Order*), *aff ' d sub nom . Illinois Bell Telephone Co . v . F.C.C.*, 740 F.2d 465 (7th Cir. 1984), *aff ' d on reconsideration*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration*), *aff ' d sub nom . North American Telecommunications Association v . FCC*, 772 F. 2d 1282 (7th Cir. 1985).

[10] The Bell Atlantic Telephone Companies, Emergency Petition for Interim Waiver of Section 64.702 of the Commission's Rules and Regulations to Permit Interim Unseparated Provision of Existing Network Channel Terminating Equipment, Mimeo No. 5244, File No. ENF 84-32, released July 6, 1984; Letter from Chief, Common Carrier Bureau, to Ronald L. Slyter, Northwestern Bell Telephone Company (July 6, 1984); Letter from Chief, Common Carrier Bureau, to John F. Beasley, BellSouth Corporation (July 6, 1984); Letter from Chief, Common Carrier Bureau, to Saul Fisher, NYNEX (July 13, 1984); Letter from Chief, Common Carrier Bureau, to Thomas J. Reiman, American Information Technologies Corporation (July 13, 1984).

[11] *See Computer III Order*, *supra* note 4 at para. 332; *see also Supplemental Notice*, *supra* note 4, at n. 402 (decision on treatment of embedded NCTE deferred until resolution of BOC CPE structural relief issue in CC Docket No. 86-79, *infra* note 12).

[12] Provision of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, *Notice of Proposed Rulemaking*, FCC 86-113 (released March 28, 1986) (*BOC Structural Relief Notice*).

[13] DDS and DS-1 are fully duplex, digital data services that may be provided over private lines or as exchange access facilities to the competing interexchange service vendors. DS-1 service provides transmission at a data speed of up to 1.544 megabits per second, while DDS service provides data speeds of 2.4, 4.8, 9.6, and 56.0 kilobits per second.

[14] Such plans must comply with the requirements set forth in Procedures Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), *Fifth Report and Order*, CC Docket No. 81-893, 49 Fed. Reg. 46,378 (Nov. 26, 1984) (*Fifth Report and Order*).

[15] 47 C.F.R. § 1.115(b) (1985).

[16] Application at ii.

[17] *Id.* at 13.

[18] BellSouth filed its Opposition one day late accompanied by a motion for acceptance of late-filed pleading, alleging difficulties in electronic transmission and noting that all parties were timely served. No party has opposed BellSouth's motion. Furthermore, it appears that a good faith effort was made to file the pleading in a timely manner, and that no party will be prejudiced by our grant of this motion. Therefore, we will grant BellSouth's motion and accept its Opposition.

[19] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., *Order*, CC Docket No. 85-26, 102 FCC 2d 655 (1985), petitions for reconsideration pending (*AT & T Structural Relief Order*).

[20] Southwestern Bell Opposition at 10-11.

[21] Verilink Opposition at 9.

[22] Southwestern Bell Opposition at 15-16.

[23] Ameritech Opposition at 4-6.

[24] Southwestern Bell Opposition at 7-9; BellSouth Opposition at 5-9; and Verilink Opposition at 3-5.

[25] 47 C.F.R. §1.115(b)(2) (1985).

[26] *NCTE Reconsideration Order*, *supra* note 6, at para. 17.

[27] Presently, NCTE is supplied in a competitive marketplace by vendors subject to a number of different regulatory schemes. AT&T is permitted to offer NCTE on an unseparated basis subject to specific nonstructural safeguards as a result of our decision to remove the structural separation requirements generally for AT&T's provision of CPE in the *AT & T Structural Relief Order*, *supra*note 19. The BOCs may provide CPE, including NCTE, subject to the structural separation requirements, although we have proposed changing those requirements in the *BOCStructuralRelief Notice*, *supra* note 12. In the *Computer III Supplemental Notice*, *supra* note 4, we are considering whether to permit provision by carriers of some or all NCTE functions on a regulated basis if the supporting equipment is located on the network side of the network/customer premises demarcation point established at Section 68.3(p) of our Rules. Independent telephone companies are not subject to the structural separation requirements and therefore may provide CPE generally, including NCTE, on an unseparated basis subject only to network disclosure and accounting requirements. The regulatory scheme applicable to the Independents' supply of CPE is also being re-evaluated in the *BOCS tructural Relief* proceeding. Finally, non-carriers provide NCTE free of regulation.

[28] 47 C.F.R. §1.3 (1985).

[29] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir. 1969).

[30] *See supra* note 13 concerning DDS and DS-1 services. According to Bell Atlantic, DDS and DCS are similar digital services, and the same type of NCTE is used in providing both DDS and DCS.

[31] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, and Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies, to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, *Notice of Proposed Rulemaking*, CC Docket No. 86-111, FCC No. 86-146 (released April 17, 1986) (*Joint Cost Notice*). The *Waiver Order*, which was adopted prior to the *Joint Cost Notice*, required Ameritech, BellSouth, and Southwestern Bell to file accounting plans with us that are based on the requirements of the *Fifth Report and Order*. The cost allocation requirements that we adopt today for Bell Atlantic and Pacific reflect the further evolution of our regulatory safeguards in this area, and are consistent with the nonstructural safeguards for enhanced services adopted in the *Computer III Order*. Adoption of these cost allocation requirements for the interim waivers granted herein does not prejudge any issue in the *Joint Cost Notice*, the *BOCS tructural Relief* proceeding, or the *Computer III Supplemental Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. ITC-86-109

Application for Authority to Participate in a Program to Modify One or More INTELSAT VI Spacecraft to Provide Enhanced K-band Coverage.

MEMORANDUM OPINION ORDER AND AUTHORIZATION

Adopted: October 6, 1986 **Released: October 21, 1986**

By the Commission:

1. On May 30, 1986, the Communications Satellite Corporation (Comsat) filed an application requesting authority to participate in a program to modify one or more INTELSAT VI satellites.[1] We placed the application on public notice on June 11, 1986. Comsat filed supplements on June 16, June 18 and July 28, 1986, to provide information on the specifics of the proposal. No comments were filed. We grant Comsat's application for the reasons set forth below.

Background

2. Comsat requests the authority to participate in a program to modify the INTELSAT VI (F-1), (F-2) and (F-3) satellites to provide enhanced K-band coverage. We have already authorized Comsat to participate in the modification of the INTELSAT VI (F-4) and (F-5) satellites for the Atlantic Ocean region to provide enhanced K-band coverage and equivalent isotropically radiated power (e.i.r.p.).[2] As on the (F-4) and (F-5) satellites, the e.i.r.p. of the (F-1), (F-2) and (F-3) will be increased by replacing the existing 8.5 watt K-band traveling wave tube amplifier (TWTA) in each beam with 20 watt units in four channels and with 40 watt units in the fifth channel. INTELSAT plans to deploy the first two INTELSAT VI satellites in the Atlantic Ocean region and the other two in the Indian Ocean region. If the launches of the first four INTELSAT VI satellites are successful, the fifth INTELSAT VI satellite would be deployed in the Atlantic Ocean region.

3. INTELSAT has approached the Hughes Aircraft Company (Hughes) about adding higher e.i.r.p capabilities on other INTELSAT VI spacecraft, and Hughes has provided a formal proposal to upgrade INTELSAT VI (F-3) to the same level of capability as the (F-4) and (F-5). The physical changes involved would be the same as on the (F-4) and (F-5), plus the replacement of the west spot beam antenna assembly. This is required since the (F-3) does not include the elliptical west spot coverage of the (F-4) and (F-5). INTELSAT also is considering the same modification on a fourth and fifth INTELSAT VI spacecraft, the (F-1) and (F-2).

4. Hughes has confirmed the feasibility of modifying all three of the unmodified (F-1), (F-2) and (F-3) spacecraft with some modification to the delivery schedule for 1988 and 1989. The contractual proposal from Hughes would involve a change in the delivery dates for the entire INTELSAT VI series. The new delivery dates are compatible with the expected launch slots. Comsat notes that the Arianespace launch failure in May 1986 has already caused some rescheduling of the INTELSAT VI launches. The delivery of the first INTELSAT VI satellite could be as early as the third quarter of 1988, with the following deliveries at intervals of about four months.

5. A delay in delivery of the first INTELSAT VI satellite until the third quarter of 1988 may require increased use of circuit multiplication equipment on some links served by the INTELSAT VA at 335.5 east longitude, operation of the INTELSAT V satellite at 174 with a small inclination of up to 0.5 , and a slightly delayed activation of some time division multiple access terminals in the Atlantic Ocean region. Comsat believes that these delays would not seriously affect the provision of services.

6. The INTELSAT Board of Governors approved the proposed modification of the INTELSAT VI (F-3) at its meeting in June 1986 for a cost of $8.905 million in April 1982 dollars, plus in-orbit incentives. Therefore, the modification can be initiated prior to the start of the spacecraft system tests. In addition to the proposed modification of the INTELSAT VI (F-3) the Board authorized the Director General to enter into a contract for the modification of the INTELSAT VI (F-1) and (F-2) satellites, for a price not to exceed $ 23.9 million in April 1982 dollars, plus in-orbit incentives. Subsequently, the Director General concluded his negotiations with Hughes to modify the INTELSAT VI (F-1) and (F-2) for a cost of $ 21.9 million in April 1982 dollars, plus in-orbit incentives.

Discussion

7. When we authorized Comsat's participation in the INTELSAT VI series satellites, we prohibited Comsat from participating in substantial modifications in their construction unless it sought prior approval from the Commission. The application under consideration here is filed to comply with that requirement.

8. Comsat states that modification of the INTELSAT VI (F-1), (F-2) and (F-3) satellites would allow flexibility in serving its users. The (F-2) and (F-3) will be deployed in the Indian Ocean region, and with an expanded west spot beam, each satellite would gain increased coverage of Europe, the Middle East or the Far East. The increased e.i.r.p. of the K-band transponders in the west spot beam would provide additional capacity or improved performance with small terminals.[3] Comsat believes that increased K-band e.i.r.p and coverage capability on INTELSAT VI spacecraft will allow INTELSAT to meet user needs and to maintain a position in the competitive international environment in which small earth stations are the trend. The move away from large earth stations requires higher e.i.r.p. levels than are available on the non-modified INTELSAT VI's. These modified spacecraft will operate over the period 1989 - 2004. Increasing the K-band TWTA power from 8.5 watts to 20 watts and 40 watts would result in e.i.r.p. levels consistent with the services and earth segment capabilites expected for that time frame, and could significantly increase capacity and permit reduced earth station size.

9. The modification of these satellites would provide enhanced K-band capability outside of the Atlantic Ocean region. Comsat expects that the availability of enhanced K-band e.i.r.p. and coverage capabilities would increase the attractiveness of these bands for digital and television services to Indian Ocean region users, and that this could generate revenue. The modification of these satellites would ensure that the enhanced capability can be offered to both ocean regions.

10. The cost of the proposed modifications is small in comparison to total system cost. The total cost to all of the INTELSAT partners for the proposed modifications of the INTELSAT VI (F-3) is approximately $8.905 million dollars in April 1982 dollars, plus in-orbit incentives of 20 % of the real year price. The cost for modification of the INTELSAT VI (F-1) and (F-2) is approximately $ 21.9 million in April 1982 dollars, plus in-orbit incentives. Thus, the total cost for the modification to the INTELSAT VI (F-1), (F-2) and (F-3) satellites will be $ 30.8 million in April 1982 dollars, plus in-orbit incentives. Comsat's share of the modification cost, at its 24 % investment share, is about $ 7.4 million in April 1982 dollars, plus in-orbit incentives.[4] The total cost of the INTELSAT VI system is approximately $ 1 billion. Therefore, the $ 30.8 million modification cost represents 3.08 % of the total system's cost. We conclude that the cost of the modifications is reasonable and justified.

11. We agree that the proposed modifications would allow INTELSAT and Comsat to seek markets for new business services. There will be potential operational and economic benefits to service users. The increased K-band coverage and e.i.r.p. will enable user access with smaller earth stations. In turn, the user can enjoy cost savings by not using national gateway earth stations and expensive terrestrial facilities between those stations and its premises. Additionally, the user has greater operational flexibility and security through choice of earth station locations.

12. We see a rational basis for authorizing the proposed modifications on the INTELSAT VI (F-1), (F-2) and (F-3). The enhancements to the INTELSAT VI satellites will provide competitive incentive for INTELSAT, resulting in overall efficiencies that will benefit end users.

Conclusion

13. We have reviewed Comsat's application and supplements requesting authority to participate in a program to modify the INTELSAT VI (F-1), (F-2) and (F-3). We have concluded that there are potential economic and operational benefits to users if the e.i.r.p. and geographical coverage of these satellites are increased as proposed.

14. Accordingly, IT IS ORDERED that the application of the Communications Satellite Corporation, File No. ITC-86-109, IS GRANTED, and that Comsat is authorized to participate in the modification of the INTELSAT VI (F-1), (F-2) and (F-3) satellites, subject to the following terms and conditions:

a. Comsat's capital expenditures toward this modification program shall be accounted for in a manner consistent with the proceedings in *Comsat, Investigation into Charges*, Docket No. 16070, 68 FCC 2d 941 (1978);

b. Comsat shall not participate in the launch or in-orbit testing of any of the satellites for which its participation in modification is approved here unless specifically authorized by the Commission upon separate application; and

c. Comsat shall not participate in any additonal substantive modifications not authorized here without prior approval by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] The application was filed under section 201(c) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. § 721 (c) (1983), and section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1983).

[2] *Modification of INTELSAT VB and INTELSAT VI Satellites*, Memorandum Opinion, Order & Authorization, FCC 86-173, File No. ITC-86-025 (released April 17, 1986).

[3] In addition, having five modified INTELSAT VI spacecraft would provide additional flexibility in satellite deployment in case of launch or in-orbit failure.

[4] Restated in 1986 dollars, with in-orbit incentives included, the cost of the modifications to the three satellites will be approximately $ 43.85 million. Comsat's share will be about $ 10.84 million, based on its 24 % investment share in INTELSAT.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-93

In the Matter of

Investigation of
Equal Access Rate Elements
Filed Pursuant to Waivers of Part 69

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: October 6, 1986; Released: October 21, 1986

By the Commission: Commissioner Dennis not participating.

1. On April 3, 1985, the Common Carrier Bureau (the Bureau) established this Docket to examine access tariff revisions filed pursuant to waivers of sections of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, Subparts B, D and E, by the Bell Atlantic Telephone Companies (Bell Atlantic) and the New York and New England Telephone Companies (NYNEX).[1] The revisions introduced new and separate rate elements intended to recover equal access costs. In establishing this Docket, the Bureau indicated that the designation of the specific issues to be investigated and the information to be required would be set forth subsequent to this Commission's action on the Federal-State Joint Board (Joint Board) recommendation concerning the appropriate separations treatment of equal access costs. The Bureau entered an accounting order to protect the interests of ratepayers and interexchange carriers (ICs) and to permit refunds of any overpayment should the investigation indicate that the rates were not justified.

2. On January 7, 1986, this Commission adopted the Joint Board's recommendation that equal access costs be separated on the basis of the relative state and interstate minutes of use of equal access facilities provided by local exchange carriers (LECs), or "access minutes."[2] We also adopted the other recommendations of the Joint Board with regard to the treatment of equal access and network reconfiguration costs. In this Order, we are designating the issues in this investigation.

I. BACKGROUND

3. Subsequent to the issuance of the *Bell Atlantic Order*, the Bureau has granted additional waivers of Part 69 and incorporated into this investigation tariff revisions filed to date by the LECs to implement or revise separate equal access rate elements. The Bureau issued individual Orders to include the separate equal access rate elements filed by four other LECs.[3] In addition, in response to several carrier requests, the Bureau granted waivers of Part 69 to permit any other carriers who wished to file similar separate rate elements to do so in the 1985 Annual Access Tariff Filings.[4] The *Waiver Order* stated that any separate rate elements established pursuant to these waiver grants would be incorporated into this Docket, would be subject to accounting orders, and would be subject to the same conditions imposed upon the five other carriers whose separate rate elements had already become effective.[5] In accordance with the discussion below, each carrier which has elected to file separate equal access rate elements must address the issues set for investigation in this Order.[6]

4. The *NYNEX Order* attempted to balance the carriers' expressed need to begin recouping equal access costs, the rights of the ICs not to be charged excessive rates and this Commission's continuing concern with minimizing the impact of equal access costs on the individual ratepayers.[7] That Order allowed the separate rate element to be employed in order to allow the carriers to begin to recover their 1985 equal access costs.[8] The *NYNEX Order* specifically indicated that the Bureau's action was not intended in any way to prejudge either the accuracy of NYNEX's assertion that these tariffs are necessary for purposes of the cost guarantee in the Modification of Final Judgment (MFJ) in the Bell System divestiture proceeding,[9] or the ultimate determination of the reasonableness of these revisions. The *Waiver Order* permitted other carriers to implement similar rate elements, subject to investigation.[10]

5. As indicated above, each of the Orders granting waivers to the carriers to implement separate equal access rate elements pending this investigation subjected the carriers to certain requirements. Specifically, the carriers were required to include only equal access costs in their separate rate elements, eliminating any network reconfiguration costs. Further, we interpreted Part 67 of the Commission's Rules to allow the use of a separations factor based on "toll minutes" for allocating equal access costs to the interstate and intrastate jurisdictions on an interim basis, pending Joint Board and Commission decisions on the appropriate allocation factor.[11] In addition, carriers were required to amortize the equal access expenses over an eight-year period. Further, the Orders required that the carriers continue to depreciate equal access capital investment over the useful life of the investment as required by the current depreciation schedules.[12]

II. DISCUSSION

6. We have concluded that a rulemaking proceeding should be instituted to determine whether a separate equal access element should be established as a permanent part of our Part 69 access rules.[13] We expect to adopt a Notice of Proposed Rulemaking dealing with that issue in a few months. Such a rulemaking proceeding will also define the interstate investment and expense to be apportioned to any separate equal access element and determine the recovery mechanism that will be required or permitted for the element.

7. In view of our decision to institute such a rulemaking, we have decided that this investigation of the interim equal access charges should be somewhat narrower in scope than the Bureau may have envisioned at the time this Docket was established. We think the public interest would better be served by using our limited resources to establish permanent measures for dealing with equal access costs in a rulemaking than to investigate the interim rate structures.[14] Therefore, we will not examine in this Docket the reasonableness of the various interim recovery mechanisms that the exchange carriers have selected and we will permit carriers to choose the recovery mechanism they wish to employ until the rulemaking proceeding has been completed. We have also concluded that no useful purpose would be served by attempting to determine whether the costs included in equal access elements that

were in effect prior to May 1, 1986 are precisely consistent with the definitions of equal access that were adopted in the *Accounting Order* or the *Equal Access Separations Order*. Our investigation will focus instead upon the total return that the carriers received from equal access, end office and transport access elements before the new separations provisions became effective on May 1, 1986. Those total return computations, however, will be based upon the interim separations and depreciation factors that were established in the various waiver Orders.

8. At the time the first equal access rate elements were filed, the LECs indicated that, in order to avoid potential loss of ability to recoup the equal access costs they were incurring but which were not included in their other access rate elements,[15] they needed effective tariffs on file immediately. In response to the LECs' concerns, those tariff revisions were permitted to become effective without the delay that would have been necessary to conduct proceedings to define equal access costs or to amend Part 69. Thus, the carriers did not have guidelines as to what costs should be included in the rate element. Indeed, an examination of the filings and the pleadings filed against the various tariff revisions that establish or modify the separate rate elements indicates that there is considerable disagreement as to what constitutes an equal access cost for purposes of this rate element.[16] In the initial filings, some of the LECs and AT&T were concerned primarily with whether the included costs were covered by the MFJ Guarantee.[17] In the most recent filings, the major definitional issue appears to be whether only those costs eligible for equal access separations treatment, as defined by the Joint Board and this Commission in the *Equal Access Separations Order*, should be eligible for inclusion in this rate element.

9. This Commission addressed interstate rates of return in light of the changes in the telecommunications industry in CC Docket No. 84-800.[18] In Phase I of that proceeding, we established a procedure for automatic refunds in the case of overearnings.[19] In the *Phase I Reconsideration Order*, we determined that our first examination of the overall rate of return for the LECs would cover the period from October 1, 1985 until December 31, 1986.[20] In that same Order, we concluded that we would evaluate the access rate elements in three aggregated groups: special access, common line and traffic sensitive switched access;[21] and determined that the equal access rate element would be included in the traffic sensitive switched category for purposes of rate of return enforcement.[22]

10. Since we will be examining the rate of return for any equal access rate in effect during the time period from October 1, 1985 through December 31, 1986 in CC Docket No. 84-800, in the instant Docket we need examine the rate of return for rate elements that were in effect only during the time period preceding October 1, 1985. In other words, we will focus only on the rate of return for any rate elements in effect from February 20, 1985, when the *NYNEX Order* was released, through September 30, 1985. It will be necessary to determine whether the carriers that established separate equal access elements in fact would have experienced a shortfall in combined revenues from the end office (Line Termination, Local Switching and Intercept) and transport elements during the relevant period in the absence of an additional charge for equal access. If such a shortfall would have existed, it will be necessary to determine whether the revenues from the equal access elements exceeded the shortfall. If the equal access charge caused the revenues to exceed the amount required to avoid a shortfall, a refund to the ICs presumably would be required.

11. The prior waivers contemplated that any separate equal access element would be adjusted when new separations rules became effective, if the Commission adopted a factor that differed from the interim "toll minutes" factor described in the waivers. The carriers did file revisions in equal access charges for the purpose of reflecting the "access minutes" separations factor that became effective on May 1, 1986. AT&T filed a petition to investigate the revised tariffs filed by the Bell Atlantic Telephone Companies, Southern Bell Telephone and Telegraph Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, Ohio Bell Telephone Company, Pacific Bell, Southwestern Bell Telephone Company, and Wisconsin Bell, Inc. We have examined the tariff revisions, AT&T's petition and subsequent revisions filed in response to discussion with our staff and have concluded that the effective or pending equal access rates reflect the new factor and are not likely to produce a rate of return in excess of the 12.75 percent authorized rate of return. Therefore, an investigation of these changes is not warranted and the AT&T petition relating to these transmittals will be denied.

III. ISSUES FOR INVESTIGATION

12. In establishing the requirements for the LECs' equal access rate elements, the Bureau indicated that the elements should include a 12.75 percent rate of return in their revenue requirements.[23] For purposes of assessing whether the LECs have earned in excess of that authorized rate of return, we are requiring that all carriers who had separate equal access rate elements in effect prior to October 1, 1985, provide the data listed below. The data should include revenues earned by the equal access rate element, revenues earned by end office and transport elements, allowable Federal income taxes, expenses and other taxes, rate base items (plant, reserves and adjustments) in accordance with Docket No. 19129,[24] the net return, and the annualized rate of return. Such data will be provided for the period from the effective date of the equal access element through September 30, 1985. The carriers that implemented equal access elements during that time period must demonstrate that a shortfall would have occurred in the absence of additional revenues from an equal access rate element and that the equal access revenues did not exceed the shortfall. In order to assist us in determining that the computations are based upon an appropriate measurement of equal access costs, the carriers must submit tables that display their equal access data[25] in a side-by-side fashion for the following categories: (1) the interstate portion of actual costs, separated on the basis of toll minutes, from the effective date of the tariff through September 30, 1985; and (2) the amortized portion of the actual costs from the effective date of the tariff through September 30, 1985.

13. In sum, our intent in setting forth these issues is to ascertain whether there have been any earnings in excess of the authorized rate of return as a result of the separate equal access rate elements, and, if so, what is the most reasonable way to correct the situation. To the extent that there are carriers who have tariffs that are subject to this investigation but which were not in effect prior to the October 1, 1985 commencement date of the CC Docket

No. 84-800 rate of return examination, no filings of cost data will be required in this proceeding. Such carriers are, of course, free to file comments relating to any of the other issues raised above.

IV. PROCEDURAL REQUIREMENTS

14. This investigation shall be conducted as a notice and comment proceeding. Local exchange carriers whose separate equal access rate elements were in effect prior to October 1, 1985 must file their Direct Cases no later than December 19, 1986, addressing the issues specified above. Other parties commenting on the LECs' Direct Cases may file Oppositions to Direct Cases or Comments on Direct Cases no later than January 17, 1986. All submissions should include in their heading the title and docket number of this proceeding.

15. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Services, Inc. (ITS), located in Room 246, 1919 M Street, N.W., Washington, D.C. The local exchange carriers filing Direct Cases shall serve copies on all parties who filed petitions against their equal access rate element tariff filings. Parties commenting on the Direct Cases should file copies with the local exchange carriers. Interested persons may obtain copies from ITS. A complete set will also be made available for review or photocopying at the Commission's docket library in Room 239, 1919 M Street, N.W., Washington, D.C.

16. Members of the general public who wish to express their views on the rates and issues included in this investigation in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C., 20554. The only requirement for such informal submissions is that they include the title of the proceeding in the heading.

17. For purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts this Order until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final Order disposing of the matter is adopted by the Commission, whichever is earlier.

18. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments of pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in previously-filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. §1.1231.

19. All relevant and timely pleadings will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the pleadings, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Order.

20. IT IS THEREFORE ORDERED that all parties subject to this investigation SHALL FILE their Direct Cases responding to the issues set forth in para. 12, *supra*, no later than December 19, 1986.

21. IT IS FURTHER ORDERED that the Petition for Suspension and Investigation filed by American Telephone and Telegraph Company against Bell Atlantic Telephone Companies Transmittal No. 43, Southern Bell Telephone and Telegraph Company Transmittal No. 1364, Illinois Bell Telephone Company Transmittal No. 800, Indiana Bell Telephone Company Transmittal No. 798, Michigan Bell Telephone Company Transmittal No. 582, New England Telephone and Telegraph Company Transmittal No. 792, Ohio Bell Telephone Company Transmittal No. 716, Pacific Bell Transmittal No. 1152, Southwestern Bell Telephone Company Transmittal No. 1350 and Wisconsin Bell, Inc. Transmittal No. 618 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico
Secretary

FOOTNOTES

[1] New England and New York Telephone Companies, Mimeo No. 2636, released Feb. 20, 1985 (*NYNEX Order*); Chesapeake and Potomac Telephone Companies, Mimeo No. 3575, released Apr. 3, 1985 (*Bell Atlantic Order*). The *Bell Atlantic Order* consolidated the investigation of Bell Atlantic's equal access rate element with that of similar revisions filed by New York and New England Telephone Companies that had been established in the *NYNEX Order*.

[2] The Joint Board and the Commission Orders define relative access minutes to include interstate interLATA equal access traffic, intrastate interLATA equal access traffic, Bell Operating Company (BOC) interstate corridor toll traffic, and American Telephone and Telegraph Company (AT&T) and Other Common Carrier (OCC) intraLATA equal access usage. Local exchange and BOC intraLATA toll traffic are excluded. Recommended Decision and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, Mimeo No. 0138, released Oct. 8, 1985, 50 Fed. Reg. 47765 (Nov. 20, 1985); Decision and Order, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-6, released Jan. 7, 1986, 51 Fed. Reg. 2708 (Jan. 21, 1986) *(Equal Access Separations Order*).

[3] Southern Bell and South Central Bell Telephone Companies, Mimeo No. 5015, released June 11, 1985 (*BellSouth Order*); The Mountain States Telephone and Telegraph Company, Mimeo No. 5548, released July 3, 1985 (*Mountain States Order*); Southwestern Bell Telephone Company, Mimeo No. 6158, released Aug. 6, 1985 (*Southwestern Bell Order*).

[4] Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at paras. 28-32 *(Waiver Order*).

[5] In addition, the Commission also extended the waiver provisions and conditions with respect to Part 69 in the *Waiver Order* to any carriers not previously granted waivers and electing to file equal access rate elements. Petitions for Recovery of Equal Access and Network Reconfiguration Costs, FCC 85-628, released Dec. 9, 1985, at para. 35 (*Accounting Order*). *See* n.12 *infra*.

[6] For clarification, the tariff provisions under investigation include (1) all of the tariff revisions allowed to go into effect subject to the first Orders (*i . e., NYNEX, Bell Atlantic, BellSouth, Southwestern Bell,* and *Mountain States Orders*); (2) changes to those tariff revisions that were filed at the end of 1985 to reflect 1986 costs and demand estimates; (3) tariff provisions for recovery of equal access costs filed on July 2, 1985 (the 1985 Annual Access Tariff Filings); and (4) changes filed to those tariffs. The tariff revisions recently filed, both those in effect and those pending, that implement the changes in the Separations Manual for equal access costs that became effective May 1, 1986 pursuant to the *Equal Access Separations Order* are discussed in para. 11, *infra*.

[7] *See NYNEX Order* at para. 4; *Bell Atlantic Order* at paras. 4-5.

[8] *See NYNEX Order* at para. 4; *Bell Atlantic Order* at para. 3. The 1984 Access Services Tariff rates that were in effect when NYNEX originally requested waivers to file an equal access rate element were based on a revenue requirement that included a forecast of 1984 equal access costs only. NYNEX stated that the major portion of its costs for equal access were to be incurred in 1985. The 1984 rates were to be in effect until June 1985 and would be inadequate to recover the capital expenses and costs which NYNEX would incur in the first five months of 1985. *See, e.g.,* New England Telephone and Telegraph Company, Transmittal No. 725, Description and Justification, filed Dec. 18, 1984, Section 1.1 at 3.

[9] *Sec* United States v. Western Electic Co., 569 F. Supp. 1057, 1066-68, 1124-28 (D.D.C.), *aff ' d sub nom* . California v. United States, 104 S. Ct. 542 (1983).

[10] *Waiver Order* at para. 30. In filing their 1985 access tariff filings the LECs could have chosen to include all equal access costs in the access rate elements set forth in Part 69 rather than using the separate equal access rate element. The time gap between cost forecast periods and rate changes that existed when NYNEX first requested to file its equal access rate element no longer was a factor by the time the other carriers implemented their rate elements.

[11] Toll minutes include intrastate intraLATA and intrastate interLATA minutes as well as interstate interLATA and interstate intraLATA minutes.

[12] The Bureau specifically stated that it was not addressing the then pending Petitions filed by Southwestern Bell, Southern Bell, South Central Bell, Pacific Bell, and Nevada Bell for waiver of the Commission's prescribed depreciation rates to permit the recovery of the equal access and network reconfiguration costs by January 1, 1994, the end of the guarantee period in the MFJ. *See NYNEX Order* at 4 n.8. Subsequently, this Commission issued the *Accounting Order*, which addressed those petitions and established accounting procedures for equal access and network reconfiguration costs. In that Order, we imposed requirements similar to those set out in the Bureau Orders granting waivers for separate equal access rate elements. Specifically, this Commission determined that network reconfiguration costs should be recorded in the normal accounts for the type of expenditure incurred and should be depreciated or expensed according to the Commission's Rules; that equal access investments should be recovered over their useful lives; that equal access expenses should be amortized over an eight-year period, separately identified and recorded in Account 139 (other deferred charges) and amortized to the same accounts that would have been charged if the item had not been deferred; that the unamortized portion of equal access expenses would earn no more than the authorized rate of return; and that waiver provisions and conditions with respect to Part 69 in the *Waiver Order* should be extended to any carrier not previously granted waivers and electing to file separate equal access rate elements.

[13] Petitions filed in response to the tariffs proposing the separate equal access rate elements suggested that a rulemaking proceeding would be required in order to permit a separate rate element to be created. *See, e.g.,* Petition to Reject or, in the Alternative, Suspend and Investigate New England Telephone Tariff F.C.C. No. 40, Transmittal No. 725, and New York Telephone Tariff F.C.C. No. 41, Transmittal No. 668, filed by MCI TelecommunicationsCorporation, Jan. 11, 1985, at 2, 4-5.

[14] The carriers have assessed flat rate charges against either the ICs' percentage of presubscribed equal access lines or their equal access trunks. While some LECs originally filed rate structures that differed from these two variations, prior to the rate elements becoming effective they filed revisions that made the rate elements conform to those we had permitted for NYNEX and Bell Atlantic. *See Southwestern Bell Order* at para. 2; *Mountain Bell Order* at para. 2.

[15] *See* note 10 and accompanying text *supra*.

[16] *See, e.g.,* Petition for Investigation of New England Telephone and Telegraph Company Tariff F.C.C. No. 40, Transmittal No. 725, and New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 668, filed by AT&T, Jan. 11, 1985, at 11-18.

[17] *See,e.g., id* . at 2-10; New York Telephone Company, Transmittal No. 668, Description and Justification, filed Dec. 18, 1984, Sections 1.1 and 1.2; Reply of the NYNEX Telephone Companies, Jan. 22, 1985.

[18] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, FCC 84-395, released Aug. 13, 1984, 49 Fed. Reg. 32971 (Aug. 17, 1984)(*NPRM*); FCC 85-458, released Aug. 14, 1985, 50 Fed. Reg. 33786 (Aug. 21, 1985) (*Supplemental Notice*); FCC 85-527, released Sept. 30, 1985, 50 Fed. Reg. 41350 (Oct. 10, 1985) (*Phase I Report and Order*).

[19] CC Docket No. 84-800 was divided into two phases; Phase I deals with enforcement issues and Phase II deals with methods and procedures for rate of return prescriptions. *See Supplemental Notice* at paras. 6-8.

[20] In changing the date for the commencement of the initial time period from June 1, 1985 to October 1, 1985, the Commission concluded that the tariffs in effect prior to October 1 were skewed by the *May 15 Cost Order* and it would be unfair to impose a requirement of accurately targeting on an element-by-element basis for that time period. Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 86-114, released Mar. 24, 1986, 51 Fed. Reg. 11033 (Apr. 1, 1986), at para. 43 (*Phase I Reconsideration Order*). The *May 15 Cost Order* does not affect our review of the equal access rate element, however, because the equal access rate element was not introduced until February 1985. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, MTS and WATS Market Structure, CC Docket No. 78-72, FCC 84-201, released May 15, 1984 (*May 15Cost Order*), *recon . denied*, FCC 84-247, released May 24, 1984.

[21] *Phase I Reconsideration Order* at paras. 34-37.

[22] *Phase I Reconsideration Order* at para. 37 & n.51.

[23] *See Accounting Order* at para. 33. *See also, e . g ., NYNEX O r d e r at para. 3; B e l l A t l a n t i c O r d e r at para. 2. In the CC Docket No. 84-800 rate of return proceeding, we have made a*

determination that the exchange carriers will be monitored for refund purposes with a 1/4 of 1 percent increment above the 12.75 percent authorized rate of return on an overall basis and with a 40 basis point increment for each of the three categories. Those ceilings, however, are not relevant to the examination being undertaken in this Docket. We clearly stated that those increments were established for the specific purpose of defining the range of earnings which would not trigger the automatic refund mechanism established in that Docket. See Phase I Report and Order at paras. 4-22; Phase *I Reconsideration Order* at para. 38.

[24] S e e , *e.g., Phase II Final Decision and Order,* 64 FCC 2d 1 (1977).

[25] Expenses and rate base accounts should be displayed on a level of detail similar to that used by Pacific Bell in its March 17, 1986 Equal Access filing, Transmittal No. 1152, in Workpapers 4A, 4B, 4C and T-2, as amended. *See* Appendix. In addition, the LECs should include any accounts omitted by Pacific Bell that are included in the Commission's Public Notice specifying the cost support data required for the 1985 Annual Access Tariff Filings, e.g., fixed charges, net return and rate of return. Public Notice, "Commission Requirements for Cost Support Material To Be Filed with ACCESS TARIFFS on March 1, 1985," Mimeo No. 2133, released Jan. 25, 1985; Public Notice, Erratum, Mimeo No. 2273, released Jan. 30, 1985. Furthermore, all data, including revenue and rate of return, should be adjusted to remove out-of-period effects.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-164

In the Matter of

Amendment of Sections of Part 22
of the Commission's Rules to
Simplify Individual Licensing
Procedures in the Domestic Public
Air-Ground Radiotelephone Service

REPORT AND ORDER

Adopted October 6, 1986; Released October 17, 1986

By the Commission:

I. INTRODUCTION

1. On April 30, 1986, the Commission released its *Notice of Proposed Rulemaking* (Notice) in CC Docket No. 86-164, *Amendment of Sections of Part 22 of the Commission's Rules to Simplify Individual Licensing Procedures in the Domestic Public Air-Ground Radiotelephone Service*, 51 Fed. Reg. 18623 (May 21,1986). This Notice proposed to amend our rules to simplify the present licensing process for individual airborne mobile units (AMUs) within the Common Carrier Bureau's Domestic Public Air-Ground Radiotelephone Service (DPAGRS).[1] We invited comment on whether to require the submission of a properly-completed Form 409, without a letter of intent from a local wireline carrier attached. We also proposed to require AMU users to comply with all applicable Commission rules and regulations pertaining to subscriber-furnished mobile units. Comment was also sought on eliminating assignment by the Commission of individual AMU call signs and designating the individual FAA registration number of each aircraft as the call sign for the individual AMU unit. In addition, we invited suggestions on alternative means for simplification of individual AMU licensing as well as on methods for investigating effectively any complaints against AMU users.

2. Wulfsburg Electronics, Inc. (Wulfsburg) and Mobile Communications Corporation of America (MCCA) filed comments. Both commenters supported our proposals. As to our request for comment on the need for the applicant to obtain a letter and identify the carrier on the Form 409, Wulfsberg questions the necessity to identify the carrier on the Form. MCC urges us to eliminate any requirement on the need to obtain the letter of intent because there have been no service-related problems. Both commenters also agree on the proposed method for designating a call sign to the AMU. No comments were received proposing any alternative to our simplification proposals.

II. DISCUSSION

3. We find that the public interest will be served and the administrative burden on Commission staff will be lightened by adopting the simplified filing requirements for the licensing of AMU's as proposed in our *Notice*. In the *Notice*, we observed that few complaints relating to interference by AMU's, all of whom supply their own equipment, arise each year and that there has never been a revocation of or forfeiture concerning any AMU license. Moreover, we noted that it is type acceptance and our operating rules, and not individual licensing, which achieves the required spectrum management. Therefore, we find that it would be in the public interest to adopt our proposal to modify our present AMU rules so that the individual licensing of AMUs becomes effective upon the date the user mails a properly completed Form 409 to the Commission. Further, we agree with the commenters that requiring a letter of intent from a local wireline carrier to be attached to the Form 409 as currently specified in Section 22.15(i)(3) serves no useful purpose and we will eliminate the requirement.

4. After consideration of the comments we conclude that all the applicant need to do is make arrangements with a carrier for service and indicate that such arrangements have been made in the designated space on the form. We note that the AMU has to arrange for service and billing with the wireline carrier in order for the appropriate billing to be made. The answering of the appropriate question on the Form 409 along with the certification statement which is still included in it will assure the Commission that the applicant has, in fact, made arrangements for service from a wireline carrier.[2] Furthermore, this minimal identification requirement supports our expressed intention in the Notice to reduce burdens while at the same time assuring that the Commission can respond effectively to complaints of any improper activities.

5. In order to ensure that licensees use and maintain the proper equipment and to prevent problems of unacceptable interference and AMU incompatibility with the carrier's mobile system, we are requiring that AMU users comply with the provisions of Section 22.514(a) pertaining to subscriber-furnished mobile units.[3]

6. Our proposal to eliminate assignment by the Commission of individual AMU call signs as currently provided by Section 22.213(b)(5) is supported by the commenters. As we stated in the Notice, the proposal to designate the individual FAA registration number of each aircraft, preceded by a prefix,[4] as the call sign for the individual AMU unit installed meets the requirements of ITU Radio Regulations, Article 19.[5] Therefore, we will adopt the proposed method of designating call signs.

III. CONCLUSION

7. We have reviewed the proposed licensing procedures and conclude that with their implementation, the Commission's resources will be utilized more efficiently and the service to AMU users provided more expeditiously. Under the procedures, the Commission retains enforcement jurisdiction over improper activities and violations of the rules that might occur. Regulatory Flexibility Act-Initial Analysis

8. *Reasons for Action and Objective*. This rule change will simplify individual licensing of airborne mobile units in the air-ground radiotelephone service.

9. *Relevant Federal Rules Which Overlap , Duplicate or Conflict with this Action*. None.

10. *Reporting, Record-Keeping and Compliance Requirements*. FCC Form 409 must be properly completed and filed for initial license, modifications, and renewal; a copy of this form will constitute the license and must be retained by the licensee.

11. *Alternatives That Would Lessen Impact*. We do not believe that there are any alternatives that would lessen impact.

IV. ORDERING CLAUSES

12. Authority for this rulemaking is contained in Sections 1, 4(i) and (j), 301, 303 and 309 of the Communications Act of 1934, as amended, and Section 553 of the Administrative Procedure Act.

13. Accordingly, IT IS ORDERED, that Part 22 of the Rules IS AMENDED as specified in the Appendix to this order. These amendments and other policies adopted in this Order will become effective pursuant to a future public notice.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] "DPAGRS" refers to both voice and signalling communications between base stations and airborne mobile units.

[2] Even though AMU licenses are not applications for common carrier services, the purpose of the certification requirement here is consistent with its purpose in the other mobile services to minimize the administrative burden to the applicant and at the same time to require a good faith representation by the applicant that it has taken the necessary steps to operate as a licensee under our rules.

[3] Pursuant to Section 22.514(a), the AMU user must now comply with all applicable Commission rules and regulations, to use type accepted equipment only, to furnish the type accepted number to the carrier, to provide evidence to the carrier that the AMU is compatible with the carrier's mobile system, to use only those mobile units which the carrier has agreed to serve, to act promptly to eliminate any unacceptable interference, and to make its equipment available for Commission inspection.

[4] The prefix will be based on a numerical/letter designation of the new Form and distinguish transmissions by AMU units from other airborne communications. Until the new Form is available and the prefix adopted, new applicants and applicants modifying or renewing licenses will use the current form and use call signs as now assigned by the Commission. We will issue a public notice announcing the availability of the new form and the specific prefix to be used.

[5] Notice, *supra*, at note 15.

APPENDIX

Rules Section

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended (47 U.S.C. 154, 303).

2. Section 22.9 (c)(2) is amended by deleting the words "and 22.15(i)(3).", to read as follows:

Section 22.9 Standard application forms and permissive changes or minor modifications for Public Land Mobile, Rural Radio, Domestic Public Cellular Radio Telecommunications, and Offshore Radio Services.

* * * * *

(c) * * *

(2) Airborne mobile stations. Applications for a license for airborne mobile stations submitted by persons who propose to become subscribers to a common carrier service for public correspondence shall be filed on FCC Form 409. This form will also be used for the modification and renewal of such licenses. Such applications shall also be accompanied by the supplemental showing set forth in Section 22.15(i)(2).

* * * * *

3. Section 22.15(i)(3) is revised to read as follows:

Section 22.15 Technical content of applications

* * * * *

(i) * * *

(3) An application for one or more airborne units shall include an affirmative representation that the applicant has made definite arrangements with a wireline common carrier for service and billing.

* * * * *

4. Section 22.213(b)(5) is amended by revising the text to read as follows:

Section 22.213 Station identification

* * * * *

(b) * * *

(5) An airborne station in the Public Mobile Service shall identify itself by the official FAA registration number of the aircraft preceded by a prefix.

* * * * *

5. Section 22.514 is amended by revising the introductory portion of paragraph (a) to read as follows:

Section 22.514. Responsibility for operational control and maintenance of mobile units.

(a) The licensee of a base station in this service shall be responsible for exercising effective operational control over all mobile units with which it communicates. The proper installation and maintenance of such mobile units shall be the responsibility of the respective licensees thereof, *except that* subscribers who elect to provide their own land and air mobile units shall be responsible for the proper installation and maintenance of such mobile units. These subscribers are required to do the following:

* * * * *

Before the
Federal Communications Commission
Washington. D.C. 20554

Joint Applications of the Lo-Jack Corporation and the Department of Public Safety of the Commonwealth of Massachusetts for an experimental license to operate a stolen vehicle recovery system	File Nos. 1562-EX-PL-85 1563-EX-PL-85

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 Released: October 21, 1986

By the Commission:

1. This item addresses a request by the Association of Maximum Service Telecasters (MST) and WNEV-TV, Inc. (WNEV-TV) that the Commission reconsider its action in granting authorizations under Part 5 (Experimental Radio Service) to Lo-Jack Corporation (Lo-Jack) and the Department of Public Safety of the Commonwealth of Massachusetts (Massachusetts DPS) to operate a stolen vehicle recovery system.

BACKGROUND

2. On October 22, 1985, Lo-Jack and Massachusetts DPS applied for authority to conduct a technical and market experiment of the Lo-Jack vehicle recovery system. Transmitters for the system operate on a frequency of 173.075 MHz. This frequency is near, but not immediately adjacent to, TV channel 7 (174-180 MHz). The frequency 173.075 MHz is allocated for use by the Federal Government. In 1984-1985, tests of the Lo-Jack system were conducted on this frequency in the Boston area under authority granted to the Federal Bureau of Investigation. There were no reported incidents of interference. The experimental authorizations were granted on March 10, 1986.[1]

3. On April 16, 1986, MST and WNEV-TV submitted petitions for reconsideration of the Commission action. They questioned various aspects of the engineering study submitted by Lo-Jack, arguing that the study failed to provide an adequate basis for our finding that the Lo-Jack system posed little threat of interference to television reception. Lo-Jack replied to the petitions, giving further arguments in support of its engineering study.

DISCUSSION

4. We found in our original decision and we still believe that, for the purpose of an experimental authorization, at least, Lo-Jack's engineering analysis was adequate. Lo-Jack used the general methodology adopted by the Commission to predict the potential for interference between FM stations and TV channel 6 stations. The potential for interference to channel 7 from the Lo-Jack operation on 173.075 MHz is similar.

5. It should be noted that our action in granting Lo-Jack's experimental license was not entirely dependent on engineering analysis. Lo-Jack's previous activity on 173.075 MHz had not resulted in complaints of interference. Moreover, the Commission presently licenses stations under Part 90 in the band 173,2-173.4 MHz. This band is in closer proximity to channel 7 television than the frequency authorized to Lo-Jack. There are no restrictions in the rules for use of frequencies in the 173.2-173.4 MHz band that pertain to protection of channel 7 television. There are presently 200 frequency assignments authorized in the State of Massachusetts in this band.

6. Finally, we remind the petitioners that licensees operating under Part 5 may summarily be ordered to cease operations by the Chief Engineer if they cause interference to stations operating in accordance with the Table of Frequency Allocations.

7. Accordingly, IT IS ORDERED that, pursuant to Section 1.106(a)(1) of the Commission's Rules, the petitions for reconsideration filed by MST and WNEV-TV are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] See Order in file Nos. 1562-EX-PL-85 and 1563-EX-PL-85, FCC 86-105 (Adopted March 10, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 85-105

In the Matter of

Amendment of Part 97 of the Commission's Rules to permit automatic control of amateur radio stations.

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 ; Released: October 16, 1986

By the Commission: Commissioner Dennis not participating.

Background

1. On January 13, 1986, we adopted a Report and Order (51 FR 3069; January 23, 1986) authorizing amateur stations transmitting digital communications on VHF and above to be operated under automatic control. We affirmed the general requirement that the station control operator be present at the station control point of any amateur station transmitting third-party traffic. Twenty-one petitions seeking full or partial reconsideration of our action have been filed.[1] The Chief, Private Radio Bureau subsequently granted a Petition for Extraordinary Relief filed by the American Radio Relay League, Inc. (ARRL) which excepts from the general requirement intermediate retransmitting stations in a network using the ARRL AX.25[2] packet protocol allowing them to be operated under automatic control while retransmitting third-party traffic. The waiver will expire concomitant with our action on the petitions for reconsideration.

2. Packet is a specialized form of digital communications relatively new to amateur radio. A packet network consists of numerous amateur stations using personal computers and associated circuitry retransmitting messages from originating stations to destination stations. It usually incorporates electronic mailbox and bulletin board capabilities. Messages are retransmitted through the network at high speeds in "packets" or fragments and are reconstituted at the destination stations.

The Petitions

3. The first issue concerns automatic control of amateur stations transmitting digital communications on amateur frequencies below VHF. We did not authorize such operation because of the greater possibility of congestion than on VHF and above. Williams, Miller, Simon, Fish, Struven, Dickson, and Smith request reconsideration of this issue. ARRL filed a partial opposition to these petitions. ARRL states such an authorization would be premature while operating standards are still evolving. It plans to coordinate a small group of packet radio enthusiasts, not limited to ARRL members, to request special temporary authorization to determine the feasibility of such operation.

4. The second issue concerns the exception for ARRL AX.25 packet protocol network intermediate retransmitting stations from the requirement for the station control operator to supervise personally all of the station transmissions containing third-party traffic. The thrust of the petitions was that in this instance such control is neither necessary or practicable. ARRL states:

> The question of risk vs. benefit in considering manual control throughout an amateur packet-network while handling third-party traffic should be resolved in favor of the benefit of the efficient functioning of the network. In the opinion of the League, the widespread public benefit of having a high-speed packet-radio network with the capacity of handling major emergencies far outweighs the narrow risk of unsupervised use of the network by unlicensed persons.

5. The principal suggestion advanced as a safeguard against unauthorized use was to require the presence of the control operator of the originating station – where messages are introduced into the packet network – at the station control point. That station control operator can detect and screen improper messages from entry into the network. Clark states that it is not feasible to check the message content at intermediate points in a packet network due to the high transmission speed and message fragmentation. ARRL states that since packets are in the order originated only at the entry point, it is the only point where the control operator requirement should be applied.

6. ARRL believes other safeguards exist in its AX.25 packet protocol. Detailed records of message transfers and histories of who accessed them are automatically maintained. All messages include serial number together with the originating station call sign, making it possible to establish a trail of accountability. Periodic reviews of these records by control operators together with monitoring by other amateur operators will detect improper usage. The ARRL states that future digital systems will inevitably use even more sophisticated logging procedures because they will be essential for proper overall network management.

Discussion

7. The matter of automatic control of amateur stations transmitting digital communications below VHF would be better addressed upon conclusion of feasibility investigations. However, the matter of unsupervised retransmission of third-party traffic goes to the fundamental purpose of the service:

> A radiocommunication service for the purpose of self-training, intercommunication and technical investigations carried out by amateurs, that is, by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[3]

Our rules for the Amateur service limit the use of amateur frequencies to licensed operators, and they preclude the use of the frequencies for pecuniary interest. Unless amateur stations which retransmit messages employ adequate safeguards, undetected use by non-amateurs of amateur frequencies is possible. Should this occur, the legitimacy of the service would be imperiled.

8. When an amateur station is under local or remote control, the control operator at the control point directly supervises every transmission. Thus, all transmitted messages are screened. Such is not the case where the station is operated under automatic control.[4]

Only after-the-fact screening is possible since the control operator can only indirectly supervise the station transmissions.[5] For this reason, our rules prohibit the transmission of third-party traffic from any amateur station under automatic control. While screening of messages at the entry point serves to prevent the introduction of improper messages into an ARRL AX.25 packet protocol network by amateur stations, it remains for monitoring by other amateur operators to detect the introduction of messages from non-amateur stations. According to the petitioners, the nature of the ARRL AX.25 packet protocol is such that control operators of intermediate retransmitting stations are unable to fully screen retransmitted messages. Thus the packet network is vulnerable to unauthorized use. The design of future retransmitting networks should take these matters into account more fully.[6]

Decision

9. With respect to the matter of authorizing automatic control of amateur stations transmitting digital communications below VHF, we will defer further consideration of such expansion. Organized feasibility projects conducted by a manageable group of amateur stations such as that planned by ARRL will be helpful in determining any rules necessary to prevent interference to and from other amateur operations.

10. With respect to the matter of automatic control of intermediate retransmitting stations, we acknowledge the safeguard assurances by the petitioners for the ARRL AX.25 packet protcol. The exception provided by the temporary waiver is incorporated into the rules. As in the case of the waiver, control operators capable of monitoring ARRL AX.25 packet protocol transmissions must alert the responsible control operator of any intermediate retransmitting station under automatic control of any misuse of the station so that prompt corrective action will be taken.

Conclusion

11. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, it is certified that the amended rules will not have a significant impact on a substantial number of small entities because such entities may not use the Amateur service for business communications.[7]

12. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

13. A copy of this Memorandum Opinion and Order will be served on the Chief Counsel for Advocacy of the Small Business Administration.

14. IT IS ORDERED, That Part 97 is amended as set forth below to permit certain amateur stations being operated under automatic control to retransmit digital packet communications containing third-party traffic.

15. IT IS FURTHER ORDERED, That the Petitions for Reconsideration ARE GRANTED insofar as they are consistent with the action taken herein and ARE DENIED in all other respects.

16. IT IS FURTHER ORDERED, That these rule amendments shall become effective November 24, 1986. .

17. This action is taken pursuant to the authority contained in 47 U.S.C. 154 (i) and 303 (r).

18. Information in this matter may be obtained by contacting Maurice J. DePont, (202) 632-4964, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Willliam J. Tricarico
Secretary

APPENDIX

Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended, as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Section 97.80(b) is revised to read, as follows:

§ 97.80 Operation under automatic control.

* * * * *

(b) No amateur station may be operated under automatic control while transmitting third-party traffic, except an amateur station retransmitting digital packet radio communications on frequencies 50 MHz and above. Such stations must be using the American Radio Relay League, Inc. *AX . 25 Amateur Packet - Radio Link - Layer Protocol, Version 2.0, October 1984 (or compatible)*. The retransmitted messages must originate at an amateur station which is under local or remote control.

* * * * *

3. Section 97.114(b)(4) is revised to read, as follows:

§ 97.114 Third-party traffic.

* * * * *

(b) * * *

(4) Third-party traffic from an amateur station under automatic control, except under the conditions specified in § 97.80(b).

* * * * *

FOOTNOTES

[1] The petitioners are: American Radio Relay League, Inc., S.E. Carlson, Thomas Clark, William Danielson, William Dickson II, Alfred Dynarski, Richard F. Fish, Robert Franklin, Karl Frazer, Edward Ingber, Robert Keller, Lawrence Kenney, Robert Martin, Donald McDougall, Walter E. Miller, Edward Novak, Donald Simon, John T. Smith, Warren Struven, Richard Whipkey, and Eric Williams.

[2] See *AX . 25 Amateur Packet - Radio Link - Layer Protocol ; Version 2 .0 , Copyright 1984 by the American Radio Relay League; October 1984.*

[3] Article 1, Section III, Paragraph 3.34, Radio Regulations, Geneva, 1979. See also 47 CFR § 97.3(a) and Appendix 2.

[4] See Report and Order in Docket 20112, adopted June 11, 1975. 40 FR 26524, June 24, 1975.

[5] Section 97.80(a) requires an amateur station operated under automatic control to incorporate devices and to implement procedures which will ensure compliance with the rules even when the control operator is not present at the station control point.

[6] Section 97.113 (c) prohibits amateur stations from retransmitting signals emanating from any class of radio station other than amateur.

[7] See 47 CFR § 97.110.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the aviation services rules to provide for single sideband operations on a 26 MHz frequency assigned to the Civil Air Patrol. RM-5435

ORDER

Adopted: October 6, 1986; Released: October 16, 1986

By the Commission:

1. The National Headquarters of the Civil Air Patrol (CAP) has filed a petition (RM-5435) to amend Part 87 of the Commission's rules to provide for single sideband operations on the frequency 26.620 MHz assigned to CAP.

2. CAP expressed a need for improved intermediate range communications support for their search and rescue operations. They proposed to meet this need by using a single sideband suppressed carrier emission (J3E) on the frequency 26.620 MHz with a maximum transmitter power of 150 watts. CAP considers that use of upper and lower sideband channels under geographic separation conditions will solve their multiple-mission requirements and meet the need for improved command and control communications.

3. We are amending the rules as requested by CAP. The planned single sideband operations can be conducted within the necessary bandwidth for double sideband operations already authorized for CAP on 26.620 MHz. CAP stations are the only stations authorized to use the frequency 26.620 MHz. Therefore, any interference caused by use of the new emissions and increased power would impact only upon CAP and would be within the capability of CAP to control.

4. Authority for this action is contained in Sections 4(i) and 303 (r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303 (r). Since this rule amendment affects only the frequency 26.620 MHz which is assigned exclusively to the CAP, this action constitutes a minor amendment to our rules in which the public is not likely to be interested. Therefore, we find for good cause that compliance with the notice and comment provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. §553(b).

5. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

6. Accordingly, IT IS ORDERED, That Part 87 of the Commission's rules is amended as set forth below effective November 21, 1986.

7. For further information regarding matters covered in this document, contact Robert E. Mickley at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 87 - Aviation Services

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 87.513 is amended by revising paragraph (g) to read as follows:

§87.513 Frequencies available.

* * * * *

(g) (1) 26.620 MHz: A3E emission, 5 watts maximum power. In the State of Hawaii, A1A, A2A, A3E emission and 250 watts maximum power is permissible.

(2) 26.6185 MHz (26.620 MHz carrier frequency), J3E emission, 150 watts maximum power.

(3) 26.6215 MHz (26.620 MHz carrier frequency), J3E emission, 150 watts maximum power.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-397

Amendment of Part 97 to Authorize Additional Privileges in the 40 Meter Band to Novice and Technician Control Operators at Amateur Stations in Alaska, Hawaii, Region 2 Pacific Insular areas and the Caribbean Insular areas.	RM-5361

NOTICE OF PROPOSED RULE MAKING

Adopted: October 6, 1986 ; Released: October 17, 1986

By the Commission:

1. On February 27, 1986, Dean W. Manley filed a petition for rule making (RM-5361) requesting that Novice and Technician control operators at amateur stations located in areas adjacent to ITU Regions 1 and 3 be authorized additional frequency privileges in the 40 meter band. Appended to the petition was a document from eleven amateur operators supporting the petitioner's request. No other comments were filed with respect to the petition. We propose to amend the rules as requested.

2. Mr. Manley states that international broadcasting in Regions 1 and 3 in the 7100-7300 kHz band renders the Novice and Technician operator privileges in the 40 meter band virtually useless in Alaska, Hawaii, Region 2 Pacific Insular areas[1] and Caribbean Insular areas.[2] He seeks to have the band 7050-7075 kHz authorized for Novice and Technician control operators at stations located in the affected areas. He notes that 7050-7075 kHz is already authorized for Novice and Technician control operators at stations in Regions 1 and 3. In addition, Mr. Manley states that the number of Novice and Technician operators in those areas is not enough to pose a significant problem to amateur operators in the forty-eight contiguous states.[3]

3. In Region 2, Novice and Technician control operators are afforded privileges at 7100-7150 kHz in the 7000-7300 kHz 40 meter Amateur service band. Since the 40 meter Amateur service band in Regions 1 and 3 only includes 7000-7100 kHz, Novice and Technician control operators are afforded privileges at 7050-7075 kHz.[4] Because international broadcasts are transmitted from Regions 1 and 3 on 40 meter frequencies used by Novice and Technician control operators in Region 2, interference can be expected to occur under certain conditions of propagation. According to the petitioner, the degree of such interference is more intense in areas close to Regions 1 and 3.

4. The Caribbean Insular areas are not near Regions 1 or 3. In PR Docket 85-104[5] we found that amateur stations throughout Region 2 experience interference from international broadcast stations. However, in that proceeding we concluded that the special 40 meter privileges authorized to General, Advanced, and Amateur Extra control operators at amateur stations in Alaska, Hawaii and other Region 2 locations near Regions 1 or 3 should also be authorized for stations in the Caribbean Insular areas. We took this action because we believed in the continental United States. For the same reason, amateur stations in the Caribbean Insular areas are included in this proceeding.

5. We believe that Mr. Manley has made a *prima facie* case as to why a rule making proceeding should be initiated. We invite all interested persons to submit comments as to whether the privileges of Novice and Technician control operators at stations transmitting from areas adjacent to Regions 1 and 3 and from Carribean Insular areas should be expanded to include the 7050-7075 kHz band, as requested.

6. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation, addressing matters not fully covered in any previously- filed comments in the proceeding, must prepare a written summary of that presentation; on the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules, 47 CFR 1.1231. A summary of rule makings is available from the Commission's Consumer Assistance Office, FCC, Washington, D.C. 20554, (202) 632-7000.

7. Authority for issuance of this Notice is contained in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(c) and (r). Pursuant to applicable procedures set forth in Section 1.415, 47 CFR 1.415 of the Commission's Rules, interested persons may file comments on or before December 22, 1986 and reply comments on or before January 21, 1987 . All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided further that the fact of the Commission's reliance on such information is noted in the Report and Order.

8. In accordance with Section 1.419 of the Commission's Rules, 47 CFR 1.419, formal participants must file an original and five copies of their comments and other materials. Participants who wish each Commissioner to have a personal copy of their comments should file an original and eleven copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. Each set of comments must state on its face the proceeding to which it relates (PR Docket Number 86-397) and should be submitted to: The Sec-

retary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

9. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities because such entities may not use the Amateur radio service for business radiocommunications. In addition, because use of the proposed additional frequencies in the 40 meter band is optional rather than mandatory, there would not be a significant impact on the manufacturers of amateur radio equipment.

10. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

11. A copy of this Notice will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

12. In view of the foregoing, rule making petition RM-5361 filed by Dean W. Manley is granted.

13. For information concerning this proceeding, contact Maurice J. DePont, Federal Communications Commission, Private Radio Bureau, Washington, D.C. 20554 (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 97 of Chapter 1 of Title 47 of the Code of Federal Regulations would be amended, as follows:

1. The authority citation for Part 97 would continue to read, as follows:

Authority citiation: 48 Stat. 1066, 1082, as amended;
47 U.S.C. 154, 303. Intepret or apply 48 Stat. 1064-1068, 1081-1105, as amended;
47 U.S.C. 151-155, 301-609, unless otherwise noted.

2. Paragraphs (a) and (b) of Section 97.7 are revised to read, as follows:

§ 97.7 Frequency privileges

* * * * *

(a) *Novice class:*

Meter Band	Terrestrial location of the amateur radio station ITU Region 1	2	3	Limitations (see para. (g))
		kilohertz		
80	3700-3750	3700-3750	3700-3750	1, 3, 32
--	--	5167.5	--	2
40	7050-7075	7100-7150	7050-7075	1, 3, 32, 33
15	21100-21200	21100-21200	21100-21200	1, 32
10	28100-28200	28100-28200	28100-28200	1

(b) *Technician class* : All of the frequency bands listed in paragraph (f), as well as the frequency bands in the following table:

Meter Band	Terrestrial location of the amateur radio station ITU Region 1	2	3	Limitations (see para. (g))
		kilohertz		
80	3700-3750	3700-3750	3700-3750	1, 3, 32
--	--	5167.5	--	2
40	7050-7075	7100-7150	7050-7075	1, 3, 32, 33
15	21100-21200	21100-21200	21100-21200	1, 32
10	28100-28200	28100-28200	28100-28200	1

* * * * *

3. Section 97.7 (g) is amended by adding a new subparagraph (33), as follows:

§ 97.7 Frequency privileges.

* * * * *

(g) *Limitations* :

* * * * *

(33) The frequency subband 7050-7075 kHz may also be used by Novice and Technician control operators at amateur stations located within ITU Region 2 which are west of 130 degrees West longitude or south of 20 degrees North latitude.

FOOTNOTES

[1] In the Pacific Insular areas, Johnston Island and Midway Island (Sand and Eastern) are in Region 2; American Samoa, Baker Island, Commonwealth of Northern Mariana Islands, Guam, Howland Island, Jarvis Island, Kingman Reef, Palmyra Island, Peale Island, Wake Island, and Wilkes Island are in Region 3. Kure Island, part of Hawaii, is in Region 3.

[2] Navassa Island, Puerto Rico (including Desecheo Island) and United States Virgin Islands.

[3] As of June 24, 1986, there were 388 Novice and 338 Technician operators in Alaska; 382 Novice and 329 Technician operators in Hawaii; 156 Novice and 28 Technician operators in Region 2 Pacific Insular areas; and 2198 Novice and 1009 Technician operators in Caribbean Insular areas.

[4] In Region 2, this segment is reserved for General, Advanced, and Amateur Extra operators.

[5] See Report and Order in Docket No. 85-104, adopted January 16, 1986. 51 FR 3785, January 30, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-90

In the Matter of

AM Broadcast Directional
Antenna Sampling Systems
and Proof of Performance
Field Strength Measurements

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1986 ; Released: October 17, 1986

By the Commission: Commissioner Dennis not participating.

Introduction/Background

1. The Commission has before it two petitions for reconsideration of the *Report and Order* (*Report*) in this proceeding.[1] These petitions were filed by the Association of Federal Communications Consulting Engineers (AFCCE) and by du Treil-Rackley Consulting Engineers (du Treil-Rackley).

2. The *Report* deregulated the rules that required AM stations using directional antenna systems to perform skeleton and partial proofs of performance measurements (proof) on a schedule prescribed in the Rules. The *Report* further concluded that certain "how to" rules for antenna monitor sampling systems were overly restrictive and unnecessary for the prevention of interference.[2] Thus, they were removed from the Rules. However, the *Report* stated that the deleted guidelines for obtaining sampling system approval would be published in a future public notice. That public notice was released December 9, 1985.[3]

Discussion

The AFCCE Petition -- Nondirectional Measurement Data

3. The AFCCE asked that the Commission amend its Rules to sanction the use of nondirectional antenna measurement data in partial proofs. They further suggested that a specific method of antenna proof analysis using nondirectional measurements be included in the Rules.

4. The Commission has a longstanding policy of recognizing the use of nondirectional measurements in partial proofs in order to establish proper pattern adjustment.[4] In light of that longstanding policy, it is unnecessary to adopt language sanctioning the use of nondirectional measurements. Although the Commission does not require nondirectional measurements, licensees are free to submit whatever auxiliary data that best supports their positions.

5. Further, because the Commission is not amending the Rules to explicitly acknowledge nondirectional measurements (and because we believe that there are many ways that such data can be incorporated into the analysis of partial proof data), we also decline to adopt a specific method of directional antenna data analysis with reference to new nondirectional measurements.

The du Treil-Rackley Petition -- Sampling System Criteria

6. The petition for reconsideration filed by du Treil-Rackley objected to the removal of the design and construction guidelines for the approval of antenna monitor sampling systems from the Rules. It argued that, although the criteria have already been released in a public notice, the Commission should reinstate them into the Rules so that they are accessible to licensees. du Treil-Rackley commented that public notices are available only to subscribers. Therefore, any AM licensee employing a directional antenna system who is not a subscriber would have difficulty in determining acceptable sampling system design.

7. On the contrary, while the Rules are available from the Government Printing Office or from commercial publishers, public notices can be obtained from the Commission or its copy contractor and are often republished in broadcast trade and reference documents. Also, unlike the Rules, public notices can be easily updated to match the growth of new technology.

8. For these reasons, the Commission reaffirms its decision in the *Report*. However, to ensure that licensees have knowledge of and access to the public notice, we are amending the Rules to add a Note explaining how this material can be obtained.

9. *Final Regulatory Flexibility Analysis*

I. *Need and purpose of this action* :

This action is taken to respond to the concerns expressed in petitions for reconsideration of the *Report and Order* in Docket 85-90.

II. *Summary of issues raised by the public comments* :

No issues were raised other than those discussed above.

III. *Significant alternatives considered and rejected* :

The Commission considered all the alternatives raised by petitions for reconsideration filed by du Treil-Rackley and the Association of Federal Communications Consulting Engineers. After carefully weighing these alternatives, the Commission is adopting the most reasonable course of action consistent with the mandate of the Communications Act.

10. The Secretary shall cause of a copy of this *Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

Paperwork Reduction Act Statement

11. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

Actions

12. Accordingly, IT IS ORDERED, THAT the petition for reconsideration filed by the Association of Federal Communications Consulting Engineers IS DENIED.

13. IT IS FURTHER ORDERED, THAT the petition for reconsideration filed by du Treil-Rackley IS GRANTED to the extent specified above, and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED, THAT Part 73 of the Commission's Rules IS AMENDED as set forth below, effective November 24, 1986.

15. IT IS FURTHER ORDERED, THAT this proceeding IS TERMINATED.

16. Authority for these actions is contained in Sections 4, 303, and 405 of the Communications Act of 1934, as amended.

17. Further information on this proceeding can be obtained by contacting John Wong or John Reiser, Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, and 303.

2. Section 73.68 is amended by adding a Note following paragraph (b) to read as follows:

Section 73.68 Sampling systems for antenna monitors.

* * * * *

(b) * * *

Note: A public notice giving additional information on approval of antenna sampling systems is available upon request from the FCC's current copy contractor.

* * * * *

FOOTNOTES

[1] *See Report and Order* in MM Docket No. 85-90, FCC 85-590, 50 FR 47051, November 14, 1985 (adopted October 31, 1985).

[2] For a complete discussion of the types of proof of performance measurements and sampling system requirements, *see* the *Notice of Proposed Rule Making* in MM Docket No. 85-90, FCC 85-151, 50 FR 13994, April 9, 1985 (adopted March 28, 1985).

[3] This Public Notice is available from the Commission's current copy contractor.

[4] Such data is particularly valuable in analyzing the array when there is a change in ground conductivity within the vicinity of the station.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SUNSHINE BROADCASTING, INC.
Fort Myers Villas, Florida
MM DOCKET NO. 83-1332
File No. BPH-820825BY

L.B.C., INC.
Cape Coral, Florida
MM DOCKET NO. 83-1334
File No. BPH-820824AI

For a Construction Permit for
a New FM Broadcast Station

MEMORANDUM OPINION AND ORDER
Adopted: October 7, 1986 Released: October 21, 1986

By the Commission:

1. The Commission has before it: (1) an Application for Review filed November 4, 1985 by L.B.C., Inc. (LBC) and an Opposition thereto filed November 19 by Sunshine Broadcasting, Inc. (Sunshine); (2) a Reply and a Motion for Leave to File Reply filed November 27 by LBC and an Opposition thereto filed December 6 by Sunshine; (3) a Supplement to Application for Review and a Motion for Leave to File Supplement filed March 12, 1986 by LBC and an Opposition thereto filed March 18 by Sunshine; (4) a Motion for Expedited Action filed January 15 by Sunshine; (5) a Motion to Dismiss Application filed January 15 by Sunshine, an Opposition thereto filed January 29 by LBC, and a Reply filed February 10 by Sunshine; (6) a Motion to Enlarge Issues; Motion to Remand filed January 29 by LBC, an Opposition thereto filed February 12 by Sunshine, and a Reply filed March 7 by LBC; (7) a Statement for the Record filed February 18 by LBC;[1] (8) a Petition for Leave to Amend filed March 7 by LBC, an Opposition thereto filed March 13 by Sunshine, and Comments filed March 13 by the Bureau; (9) a Petition for Leave to Amend filed April 9 by Sunshine; and (10) a Motion to Reopen Record filed April 22 by LBC and an Opposition thereto filed April 23 by Sunshine.

2. Sunshine and LBC are applicants for a new FM radio station on Channel 292A. Sunshine specifies Fort Myers Villas, Florida as its community of license, while LBC proposes Cape Coral, Florida, which is part of the same metropolitan area. Both Administrative Law Judge Frederic J. Coufal and the Review Board found that Fort Myers Villas has a greater need for new service than Cape Coral and therefore preferred Sunshine over LBC without reaching the standard comparative issue.[2] Both the ALJ and the Board also found that Sunshine had not made misrepresentations to the Commission or abused the Commission's processes.

3. We agree with the Board's result in this case and will deny review of the Board's Decision. However, interlocutory matters raised by the parties subsequent to the Board's Decision require discussion.

4. According to LBC, site availability and misrepresentation issues should be added against Sunshine. LBC points out that Sunshine specifies as its transmitter site lot 63, Block 396, Unit 7, Cape Coral, Florida, a site with a front width of 40 feet. LBC further notes that the Cape Coral municipal zoning ordinance requires that lots within the classification of Sunshine's transmitter site have a minimum frontage of 50 feet. LBC asserts that the Cape Coral City Council is reluctant to grant waivers of the 50 foot requirement. Additionally, LBC maintains that Sunshine had a motive to deceive the Commission as to the suitability of its site.

5. Sunshine responds that LBC's motion is procedurally and substantively defective. Sunshine contends that LBC's motion is untimely since LBC could have investigated the suitability of the transmitter site earlier. Sunshine also submits an affidavit by a local attorney stating that Sunshine could likely obtain a waiver of the 50 foot requirement.

6. We will deny the requested issues. Initially, we agree with Sunshine that LBC's Motion is untimely. Sunshine specified the site in question in April of 1984. LBC offers no justification for why it did not question the suitability of the site until nearly two years later, after the record was closed.[3] As to the merits, it is well established that the Commission generally leaves zoning questions to local zoning authorities and will not add an issue based on a mere difference of opinion as to whether local officials will sanction the site.[4] Absent negative action by the Cape Coral City Council no issue will be added.

7. LBC also seeks to reopen the record based on the recent disclosure that Sunshine's principal, Jerald M. Bellairs, has accepted a position as general manager of Stations WJFX(AM/FM), Aiken, South Carolina.[5] LBC contends that the Commission should reevaluate Sunshine's commitment to integrate Bellairs into the management of the proposed station here. However, in view of the fact that Bellairs states that he will terminate his employment with the South Carolina stations to fulfill his integration pledge, there is no reason to inquire further into this matter.

8. An additional matter involves LBC's proposed transmitter site. In September 1985 LBC reported that its proposed transmitter site had been sold and that it was seeking an alternative site. On March 7, 1986 LBC sought to amend its application to specify a new site. No objection has been raised to the technical aspects of the new site. However, Sunshine argues that LBC has lacked diligence in seeking the new site and urges that the new site should be rejected and LBC's application dismissed. LBC responds that, although it has taken approximately six months for it to secure an alternative site, during that period it made continuous and diligent efforts to negotiate with various land owners.

9. We will permit LBC to specify a new site. The question of diligence must be evaluated in light of the equities of the case.[6] LBC maintained an available site throughout most of this proceeding. It lost the site through no fault of its own. Although it required an extended period to find an alternative site, LBC has documented continuous efforts to secure a site. At this stage of the proceeding, the delay prejudiced neither the Commission's processes nor Sunshine. Thus, it would be unreasonably harsh to penalize LBC for the time interval it required to obtain an alternative site.[7]

10. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Reply filed November 27, 1985 by L.B.C., Inc. IS DENIED and the associated Reply IS DISMISSED; [8] the Motion for Leave to File Supplement filed March 12, 1986 by L.B.C., Inc. IS GRANTED and the associated Supplement IS ACCEPTED for filing; [9] and

pursuant to Section 1.115(g) of the Commission's Rules the Application for Review filed November 4, 1985 as supplemented IS DENIED.

11. IT IS FURTHER ORDERED, That the Motion to Enlarge Issues; Motion to Remand filed January 29, 1986 by L.B.C., Inc. IS DENIED.

12. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed April 9, 1986 by Sunshine Broadcasting, Inc. IS GRANTED and the attached Amendment IS ACCEPTED for filing; and the Motion to Reopen Record filed April 22, 1986 by L.B.C., Inc. IS DENIED.

13. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed March 7, 1986 by L.B.C., Inc. IS GRANTED and the attached Amendment IS ACCEPTED for filing; the Motion to Dismiss Application filed January 15, 1986 by Sunshine Broadcasting, Inc. IS DENIED; and the associated Motion for Expedited Action IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] This pleading is related to LBC's March 7 Petition for Leave to Amend.

[2] *Sunshine Broadcasting, Inc.*, 101 FCC 2d 483 (Admin. L.J. 1984), *aff'd*, 101 FCC 2d 476 (Rev. Bd. 1985), *recon. denied*, FCC 85R-80, released October 3, 1985.

[3] *See High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396-97 (1984).

[4] *Gainesville Media, Inc.*,59 FCC 2d 382, 385 (Rev. Bd. 1976).

[5] Good cause having been shown, Sunshine's unopposed Petition for Leave to Amend reporting this fact will be granted.

[6] *Anax Broadcasting, Inc.*,87 FCC 2d 483, 489 (1981).

[7] *Compare with Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983). *See Bison City Television 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982).

[8] Replies to oppositions to applications for review are not permitted by the Commission's Rules. *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 876 (1976); Section 1.115(f) of the Commission's Rules. LBC has shown no special circumstances in the instant case.

[9] The Supplement reports a recent Initial Decision relevant to an issue in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Video Inc., Docket No.20198
Revised Rates for Microwave Service;
Tariff F.C.C. No. 4,
Transmittal Nos. 44 and 45

Western Tele-Communications, Inc. Docket No. 20493
Revised Rates for Microwave Service
to Broadcast and Cable Television
Customers in Wyoming, Idaho and
Montana;
Tariff F.C.C. No. 3,
Transmittal No. 38

American Television and Docket No. 21047
Communications Corporation
Revisions to Tariff F.C.C. No. 2,
Transmittal No. 17

United WEHCO, Inc. Docket No. 21145
Revised Rates for Microwave Service
Tariff F.C.C. No. 1,
Transmittal No. 14

American Television Relay, Inc. CC Docket No. 78-24
Tariff F.C.C. No. 8
Transmittal No. 78

Western Union Telegraph Co. Docket No. 20098
Tariff F.C.C. Nos. 254 and 261
Transmittal Nos. 6986 and 6992

RCA Global Communications, Inc.
Tariff F.C.C. Nos. 93 and 94
Transmittal Nos. 3922, 3955
and 3985

RCA Alaska Communications, Inc.
Tariff F.C.C. No. 1
Transmittal No. 54

RCA American Communica- CC Docket No.78-68
tions, Inc.
Revisions to Tariff F.C.C. No. 1
Fixed Term Transponder Service
Transmittal No. 61

American Satellite Corporation CC Docket No. 78-70
Revisions to Tariff F.C.C. No. 1
Transmittal No. 45

The Western Union Telegraph Co. CC Docket No. 78-99
Revisions to Tariff F.C.C. No. 261
Pertaining to Video Channel Service
Transmittal No. 7314

RCA American Communications, Inc.
Revisions to Tariff F.C.C. No. 1
Transmittal Nos. 78, 80 and 83

ORDER

Proceedings Terminated

Adopted: October 7, 1986; Released: October 16, 1986

By the Commission:

1. The captioned dockets, opened between 1974 and 1978, were established to investigate various other common carrier (OCC) tariff filings. Several of these dockets involve population or subscriber sensitive rate structures for microwave transmission of television signals to cable television systems. The remaining dockets deal with revisions to tariffs for domestic satellite services. Each of the captioned dockets was deferred pending the development of policies in the *Competitive Carrier* rulemaking.[1] We have determined that no further action is required in these dockets.

2. Accordingly, IT IS ORDERED that Docket No. 20198, Docket No. 20493, Docket No. 21047, Docket No. 21145, CC Docket No. 78-24, Docket No. 20098, CC Docket No. 78-68, CC Docket No. 78-70, and CC Docket No. 78-99 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983); Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020, (1985); vacated and remanded, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985). The captioned dockets were deferred in the following orders: United Video, Inc., 49 FCC 2d 878 (1974); Western Tele-Communications, Inc., 55 FCC 2d 203 (1976); American Television and Communications Corporation, 62 FCC 2d 171 (1976); United WEHCO, Inc., 63 FCC 2d 741 (1977); American Television Relay, 67 FCC 2d 527 (1978); and RCA American Communications, Inc., 69 FCC 2d 426 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-584

In the Matter of

Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities of Alaska — RM-3304

Memorandum Opinion and Order

Adopted: October 8, 1986 **Released: October 24, 1986**

By the Commission:

I. Introduction

1. Before the Commission is the petition for reconsideration of our decision in *Bush Reconsideration I*[1] filed by American Telephone and Telegraph Company (AT&T). AT&T requests Commission reconsideration of that portion of *Bush Reconsideration I* interpreting Part 67 of the Commission's rules to allow the Alaskan Bush (Bush) telephone companies to allocate their investment and expenses associated with their fifty percent ownership interest in jointly-owned earth station facilities between the interstate and intrastate jurisdictions for an interim period using Alascom, Inc.'s (Alascom's) present toll plant cost allocation factors. AT&T's petition is opposed by Alascom, United Utilities, Inc. (United) and the State of Alaska. For the reasons stated below, the petition of AT&T is denied.

II. Background and Summary

2. In *Bush Reconsideration I*, we affirmed and clarified the policies set forth in the *Final Decision*.[2] The *Final Decision* established a joint ownership policy for earth stations providing message telephone service in Bush communities where competing applications had been filed by Alascom and a local exchange carrier. We ordered Alascom and the certificated local exchange carrier to share ownership of the Bush earth stations with each party having an undivided 50 percent interest in those facilities.[3] One of the three issues reviewed in *Bush Reconsideration I* dealt with the allocation of costs associated with Bush earth stations between the interstate and intrastate jurisdictions pursuant to Part 67 of the Commission's rules. Alascom's 100 percent ownership of the Bush earth station facilities resulted in a large portion of Alascom's Bush earth station costs associated with the provision of toll service being assigned to the interstate jurisdiction and being recovered through the charges for interstate toll services. Both Alascom and United asserted that with the existing separations procedures, transfer of one-half of Alascom's Bush earth station investment to the local Bush exchange carriers would greatly reduce the interstate allocation of these costs, forcing Alaskan ratepayers to bear a much greater portion. In order to prevent a substantial and unintended increase in the allocation of these costs to the intrastate jurisdiction (and thus the Alaskan rate payers) as a result of our Bush earth station ownership policy, we interpreted Part 67 of the Commission's rules to allow the joint owner's earth station costs to be allocated between the jurisdictions for an interim period using Alascom's toll plant cost allocation factors. This interim allocation procedure was to remain in effect until the Commission adopted permanent measures to deal with the issue.[4] The Commission noted two separate joint board proceedings which were considering separations issues and decided these were the proper forums in which to make permanent decisions on separations rules.[5]

3. In its petition, AT&T asserts that the action taken by the Commission in *Bush Reconsideration I* constitutes a "unilateral change" in jurisdictional separations rules without the Federal/State Joint Board proceeding required by Section 410(c) of the Communications Act of 1934, 47 U.S.C. § 410(c). AT&T explains that when Alascom owned 100% of the Bush earth stations, a "disproportionate" amount of the investment in those earth stations was allocated to the interstate jurisdiction. Under current separations rules, AT&T asserts, United (a local exchange carrier) may not make a similar "overallocation" of its investment in facilities used for both intrastate and interstate services because United does not have the extensive interstate plant upon which Alascom's averaging procedure is based. The separations rules, AT&T asserts, call for United to average the costs of its own plant based on its own circuit miles. For this reason, AT&T argues that Commission action in *Bush Reconsideration I* constituted a change of the separations rules rather than a mere interpretation. Further, AT&T asserts that this change of "present separation procedures" under Part 67 of the Commission's rules was without prior consideration of a joint board; a violation of Section 410(c) of the Communications Act, which requires referral of any proposed separations rules to the Joint Board "before" such rules may be adopted by the Commission.

4. Alascom and United seek dismissal of AT&T's petition alleging that it is untimely. Both assert that the facts AT&T now raises were presented to the Commission with Alascom's earlier petition for reconsideration of the *Final Decision*.[6] Alascom and the State of Alaska also seek denial of AT&T's petition arguing that the Commission's action in *Bush Reconsideration I* did not violate Section 410(c) of the Communications Act. Both assert that the Commission's interpretation of Part 67 separations procedures on an interim basis was a reasonable effort to preserve the status quo for the Alaskan ratepayer, pending final Joint Board action.[7]

III. Discussion

5. The question presented by AT&T's petition concerns the Commission's authority to interpret the separations procedures without first obtaining a joint board recommendation pursuant to the provisions of Section 410(c). Section 410(c) states:

> The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and .may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall . prepare a recommended decision for prompt review and action by the Commission.

It cannot be seriously contended that any language in Section 410(c) precludes the Commission from interpreting the separations procedures contained in Part 67 of the Commission's rules. Rather, the language, "which it institutes pursuant to a notice of proposed rulemaking," limits the Commission's discretion only in those instances when a rule change is being proposed. In initiating the instant proceeding, the Commission did not propose to change any separations rules or to alter the *status quo* with respect to the separations allocations between jurisdictions. Thus, the question here is whether the Commission properly exercised its discretion in interpreting the separations rules.

6. The interpretation of the separations rules to allocate the undivided half interest of the exchange carrier pursuant to Alascom's conversation minute mile factor was reasonable. First, as an undivided half interest, there is no real division in the facilities.[8] Second, the Commission previously referred issues relating to separations issues affecting Alaska to two Joint Boards. In CC Docket No. 83-1376, we established a Joint Board to evaluate the Alaska market structure to harmonize rate integration and competition in that market. In CC Docket No. 80-286, we referred broad allocation issues relating to interexchange plant to a Joint Board.[9] Thus, an interpretation of the separations procedures that maintained the *status quo* reduced any temporary dislocations that might have resulted from a contrary interpretation of the separations rules prior to the resolution of the Joint Board proceedings. It was not intended that the Alaskan ratepayer be subjected to a significant rate increase due to any decision made in the Bush proceeding. Rather the purpose of the Bush proceeding was to explore and resolve those issues pertaining to the ownership of earth station facilities in Bush communities. Issues pertaining to the proper separations and settlement policy for message telecommunications service facilities in the State of Alaska have been referred to and will be decided by the proper authority pursuant to Section 410(c) of the Communications Act.

7. Accordingly, IT IS ORDERED that the petition for reconsideration of *Bush Reconsideration I* in this proceeding filed by American Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Memorandum Opinion and Order, CC Docket No. 80-584, RM-3304, FCC 86-68 (released February 25, 1986) (*Bush Reconsideration I*).

[2] Earth Stations re: Final Decision to Establish Joint Ownership, 96 FCC 2d 522 (1984) (*Final Decision*).

[3] United was the eventual, sole certificated local exchange carrier to participate in the joint ownership scheme. *See* Bush Reconsideration I, *supra* note 1 at note 2.

[4] *See id.* at 8-10.

[5] The first of these proceedings is addressing cost allocation and market structure issues related specifically to the provision of telecommunications services to Alaska. Integration of Rates and Services, 50 Fed. Reg. 41714, CC Docket No. 83-1376, October 15, 1985. The second is the joint board proceeding in CC Docket No. 80-286, Amendment of Part 67 of the Commission's Rules, which is considering revisions in the categorization and allocation of central office equipment and interexchange costs in Part 67 of the rules.

[6] In its reply, AT&T states that a change in the separations rules was not proposed in the Bush docket until Alascom's May 29, 1984 *Reply to "Partial Opposition" of United Utilities, Inc.*; a copy of which was not served upon AT&T. Because we are denying the petition on its merits, we need not reach the question of the timeliness of AT&T's petition.

[7] AT&T asserts that in order to maintain the current allocation, a separations rule *must* be implemented. This is because the change of Bush earth station ownership ordered in this docket would otherwise necessarily result in a different separations allocation. In other words, AT&T asserts, "the present separation procedures" would cause a jurisdictional shift of costs once the change in ownership takes place and only a change in the separations rule could preserve the dollar effect which Alascom and United seek to maintain. Furthermore, AT&T asserts, under Section 410(c), this type of rule change can only be made after Joint Board consideration.

[8] We could have reached the same conclusion by postponing the timing of the joint ownership arrangement, thereby leaving Alascom with 100 percent ownership. This would have delayed the benefits flowing from joint ownership, a consequence that would have been inconsistent with the public interest.

[9] In Integration of Rates and Services, *supra* note 5 at 41716, we stated,

> The Joint Board, pursuant to the mandatory provisions of Section 410(c), is also being asked to recommend any changes in separations procedures relating specifically to Alaska that may be required to implement any market structure changes it recommends.

Furthermore, *id*. at note 20, we stated,

> We have referred separations issues relating to a broad range of interexchange plant and expense categories to a separate Federal-State Joint Board in CC Docket No. 80-286, including consideration of whether changes are necessary in the manner in which satellite facilities and expenses are allocated between the state and federal jurisdictions. Amendment of Part 67, FCC 84-133 (released April 11, 1984), 49 Fed. Reg. 18318 (April 30, 1984). However, this Joint Board will be focusing on matters specific to Alaska, while the Joint Board in CC Docket No. 80-286 will be examining broader questions concerning nationwide separations policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Common Carrier Bureau Policy
For Review of Petitions To
Reject and Petitions To Suspend
and Investigate Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 1986 ; Released: October 20, 1986

By the Commission:

1. U.S. Telecom, Inc. (U.S. Telecom)[1] and Tele-Communications Association (TCA) have filed Applications for Review of a Common Carrier Bureau policy, announced by Public Notice on April 15, 1986[2] regarding the issuance of Bureau Orders denying petitions to reject or to investigate new tariff filings. The petitioners request that this Commission review and rescind the Bureau's policy. For the reasons set forth below, we dismiss the Applications for Review.

2. In the *April 15 Notice*, the Bureau stated that "it would no longer routinely issue Orders addressing substantive and procedural issues raised by petitioners regarding tariff filings that are being allowed to take effect without imposition of an investigation or accounting or reporting requirements." The Public Notice also said "it is the Bureau's view that in most cases, extensive Orders regarding tariffs that have been allowed to take effect without adverse action are not necessary, and that preparation and issuance of such Orders consume an undue portion of the Bureau's resources."

3. TCA contends in its Application that the Bureau policy ignores the Commission's responsibilities under the Administrative Procedure Act (APA) insofar as it violates the requirement of Section 555(e), 5 U.S.C § 555(e), that an agency provide "a brief statement of the grounds for denial" of a "petition or other request of an interested person made in connection with any agency proceeding." TCA submits that without the accountability provided by a statement of the agency's reasons for denying petitions against tariffs, administrative oversight will deteriorate and users of telephone service will directly suffer.

4. U.S. Telecom asserts similarly that the Bureau's policy will deny both carriers and reviewing courts a body of important precedent, thereby making it impossible for the petitioner or a reviewing court to know if the agency has met its burden of engaging in reasoned decisionmaking. Further, it contends that the Bureau's justification for this new policy, that it will conserve agency resources, is fallacious because parties will now automatically seek Commission review of Bureau Orders issued pursuant to the new policy.

5. We find that the petitioners' challenge to the statements contained in the Public Notice is premature. The Public Notice served only as an announcement of action that would be taken by the Common Carrier Bureau at a future date.[3] The announcement itself does not constitute a final action by the Bureau which is reviewable.[4] If the petitioners do not agree with the Bureau's action regarding any tariff filing, they may file an Application for Review of that action at the appropriate time.

6. IT IS THEREFORE ORDERED that the Applications for Review filed by U.S. Telecom, Inc. and Tele-Communications Association ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] On June 16, 1986, the Commission approved a merger between U.S. Telecom and GTE Sprint to become U.S. Sprint. *See* Application for Consent to Assignment of Licenses and Transfer of Control of Certain Subsidiaries of GTE Corporation and United Telecom, Inc. to U.S. Sprint Communications Co., Mimeo No. 5210, released June 18, 1986.

[2] Public Notice Announcing New Policy Regarding Issuance of Tariff Orders, Mimeo No. 3805, released Apr. 15, 1986 (*April 15 Notice*).

[3] Although we believe it is premature to reach the merits of the application for review, we note in passing that there is no reason to believe the practice described in the *April 15 Notice* will result in any violation of Section 555(e).

[4] *See* 47 C.F.R. Section 1.104(a) of the Commission Rules, § 1.104 (a). This section provides that the right of review applies to all final actions taken pursuant to delegated authority. *See also* AT&T, Long Lines Department, Provision of Tariff F.C.C. No. 260, Private Line Services, Series 5000 (TELEPAK), Docket No. 18128, FCC 77-539, released Aug. 4, 1977.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WARMAC COMMUNICATIONS, INC. Springfield, Florida	MM DOCKET NO. 83-1223 File No. BPH-820927AF
BIBLE BROADCASTING SYSTEMS, INC. Springfield, Florida	MM DOCKET NO. 83-1224 File No. BPH-830215AF
MARTIN INTERMART,INC. Springfield, Florida	MM DOCKET NO. 83-1225 File No. BPH-830215AG
BETTY F. MARTIN Callaway, Florida	MM DOCKET NO. 83-1227 File No. BPH-830215AI

For Construction Permit for a New FM Station

ORDER

Adopted: October 15, 1986; Released: October 22, 1986

By the Commission:

1. We have before us: (a) an Application for Review of a Review Board Decision (FCC 85R-75, 103 FCC 2d 1218, released September 6, 1985) filed October 7, 1985, by Bible Broadcasting Systems, Inc.; (b) a Contingent Application for Review filed October 7, 1985, by Betty F. Martin; and (c) an Opposition to Application for Review filed October 22, 1985, by Betty F. Martin. [1]

2. Also, on March 7, 1986, Martin filed an unopposed Request for Official Notice of an award of a construction permit for a new Class A FM station at Springfield, Florida. [2] The motion is granted. Award of the Springfield construction permit is a change in core circumstances which is determinative of the Section 307(b) issue. Moreover, notice is requested of an uncontroverted fact which does not require further hearing. The Review Board awarded the construction permit to Martin on the basis of the standard comparative issue. The Board agreed with the determination of the ALJ that there were insufficient distinctions in the proposed communities of license - Springfield or Callaway, Florida - to award a Section 307(b) preference to either community. Now, as the only community in the proceeding without its own local transmission service, Callaway is to be preferred. Since Martin is the sole applicant proposing service at Callaway, the application of Martin is granted. [3]

3. ACCORDINGLY, IT IS ORDERED, That the Request for Official Notice filed March 7, 1986 by Betty F. Martin IS GRANTED and her application for a construction permit (File No. BPH-830215AI) IS GRANTED.

4. IT IS FURTHER ORDERED, That the Application for Review filed October 7, 1985, by Bible Broadcasting Systems, Inc. IS DISMISSED as moot.

5. IT IS FURTHER ORDERED, That the Contingent Application for Review filed October 7, 1985, by Betty F. Martin IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Warmac Communications,Inc. and Martin Intermart, Inc., did not file an Application for Review of the Review Board's decision. As to them, the denial of their applications by the Board is final.

[2] The application of VBM Enterprises, Inc. for the new station (File No. BPH-8405141A) was granted in connection with the approval of a settlement agreement in MM Docket No. 85-278. See Memorandum Opinion and Order, FCC 86M-626 (released February 20, 1986).

[3] Local transmission service bestows such important benefits that Section 307(b) has been consistently interpreted to virtually ensure an applicant for first local service preference over one who merely proposes to complement existing local operations. Pasadena Broadcasting Co. v. F.C.C., 555 F.2d 1046, 1050-51 (D.C. Cir. 1977). Thus, there is no need for further consideration of the applicants' comparative qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JARAD BROADCASTING COMPANY, INC. Garden City, New York	MM DOCKET NO. 84-301 File No. BPH-830325AC
SPECTRON BROADCASTING CORPORATION Garden City, New York	MM DOCKET NO. 84-303 File No. BPH-830516AK
GARDEN CITY BROADCASTING, INC. Garden City, New York	MM DOCKET NO. 84-304 File No. BPH-830713AQ
WESTPLEX BROADCASTING COMPANY Garden City, New York	MM DOCKET NO. 84-305 File No. BPH-830714AE
NORTH SHORE BROADCASTING Garden City, New York	MM DOCKET NO. 84-306 File No. BPH-830714AF
DECEMBER VENTURES, INC. Garden City, New York	MM DOCKET NO. 84-307 File No. BPH-830714AG
WINK RADIO, INC. Garden City, New York	MM DOCKET NO. 84-308 File No. BPH-830714AH
FONIC BROADCASTING CO. Garden City, New York	MM DOCKET NO. 84-309 File No. BPH-830714AI
MID-ISLAND BROADCASTING, INC. Garden City, New York	MM DOCKET NO. 84-310 File No. BPH-830714AK
McCOMAS BROADCASTING CORPORATION Garden City, New York	MM DOCKET NO. 84-312 File No. BPH-830714BF

For Construction Permit
for a New FM Station

Appearances

Lewis J. Paper and *Charles B. Molster, III*, on behalf of Jarad Broadcasting Company, Inc.; *Robyn G. Nietert* and *Angela V. Shaw*, on behalf of Spectron Broadcasting Corporation; *Dennis J. Kelly* and *Alfred C. Cordon*, on behalf of Garden City Broadcasting, Inc.; *Howard M. Liberman* and *Nora E. Garrote*, on behalf of Westplex Broadcasting Company; *Allen J. Rothman* and *Jessel Rothman*, on behalf of North Shore Broadcasting; *Richard S. Rodin* and *Marissa G. Repp*, on behalf of December Ventures, Inc.; *William R. Richardson, Jr.*, on behalf of WINK Radio, Inc.; *George Mamos*, on behalf of *Fonic Broadcasting Co.; and Jerome S. Silber*, on behalf of McComas Broadcasting Corporation.

DECISION

Adopted: September 30, 1986; Released: October 16, 1986

By the Review Board: MARINO (Chairman), JACOBS, ESBENSEN.

Board Member ESBENSEN:

1. This proceeding involves the nine mutually exclusive applications of Jarad Broadcasting Company, Inc. (Jarad), Spectron Broadcasting Corporation (Spectron), Garden City Broadcasting, Inc. (GCB), Westplex Broadcasting Company (Westplex), North Shore Broadcasting (NSB), December Ventures, Inc. (DVI), WINK Radio, Inc. (WINK), Fonic Broadcasting Co. (Fonic), and McComas Broadcasting Corporation (McComas) for permanent authority to construct an FM broadcast station to operate on Channel 224 at Garden City, New York, to replace the deleted facilities of Station WLIR(FM).[1] By *Hearing Designation Order* (*HDO*), 49 Fed. Reg. 15132, published April 17, 1984, these applications were designated for consolidated hearing[2] on the standard comparative issue, including a comparison of the applicants' respective coverage of areas and populations. By *Memorandum Opinion and Order*, FCC 84M-2853, released June 25, 1984, presiding Administrative Law Judge John M. Frysiak (ALJ) added an issue to determine whether Spectron had good cause for locating its proposed main studio outside the principal community to be served and, if so, whether it would be consistent with the public interest.

2. In his *Initial Decision* (*I.D.*), *FCC 86D-13, released March 4, 1986, the ALJ first resolved the main studio issue in favor of Spectron, I.D.*, para. 166, and then ultimately concluded that Spectron was comparatively the best applicant, *id.at para. 206.* In reaching this determination, the ALJ assessed comparative demerits under the comparative factor of diversification of mass media control to Westplex, NSB, DVI, and McComas; and concluded that under the factor of integration of ownership and management: (1) DVI (with 100% part-time credit) and Fonic (76% full-time credit) were decisionally inferior to the 100% full-time proposals of Jarad, Spectron, GCB, Westplex, NSB, WINK, and McComas; and (2) Spectron, with 100% qualitative enhancement credits for local residence, civic participation, minority and female ownership, and limited broadcast experience, edged out Jarad and Westplex, the qualitatively closest applicants. *Id.at paras. 204-206. He also concluded that no applicant should receive a comparative coverage preference, despite WINK's proposal to serve substantially larger - but already well-served - areas and populations. Id.* at para. 167.

3. This proceeding is now before the Review Board on exceptions filed by the parties. We have reviewed the *I.D.in light of the exceptions and reply briefs, the oral argument held July 3, 1986, and the underlying record. Except as discussed herein, we adopt the findings of fact and conclusions of law in the I.D.* However, as we discuss herein, we reverse the ALJ's conclusion that Spectron is the comparatively superior applicant, and conclude instead that a grant of Jarad's application will best serve the public interest.

4. *Jarad.* The ALJ credited Jarad with 100% full-time credit for the proposed integration of its sole principal, Ronald Morey, as general manager of the proposed station, qualitatively enhanced by his residence within the proposed service area since 1977, his civic activities, and his broadcast experience. The ALJ also credited Jarad

with 100% minority ownership enhancement credit for Mr. Morey's alleged status as a Native American. He also concluded that neither Jarad nor Mr. Morey had any attributable mass media ownership interests. *I.D.*, paras. 12-18, 168. Exceptions have been filed which assert that: (1) Jarad should be charged with a diversification demerit because Mr. Morey owns a "voice over" business which is utilized "by advertising agencies in the sale of commercials to both radio and television stations" (NSB Br. at 26); (2) Mr. Morey's "voice over" business will prevent him from effectuating his 100% full-time integration commitment to the proposed station (Spectron Br. at 10-11; GCB Br. at 26-27; and NSB Br. at 28-29); and (3) Mr. Morey is not entitled to his claimed minority status (Spectron Br. at 2-8; GCB Br. at 20-26; Westplex Br. at 40-41; NSB Br. at 30-34; WINK Br. at 27-33; and McComas Br. at 9-10).

5. We first address NSB's challenge to Jarad's diversification posture. NSB claims that Mr. Morey's "[s]imultaneous ownership of Jarad and R. J. Morey, Inc. [the 'voice over' business] ... creates the risk that Mr. Morey would ... gear Jarad's programming and advertising to satisfy R. J. Morey, Inc.'s national clients rather than the interest of the local community" and that "he will be beholden to the advertisers and agencies which compensate him so handsomely for his voice-over services." NSB Br. at 27-28. However, the hearing record reveals NSB's expressed concerns to be purely speculative and fanciful. Moreover, common sense in the day-to-day operation of a broadcast facility (where the income to the station will depend on *hundreds* of different advertisers) dictates that NSB's arguments are preposterous. R. J. Morey, Inc. contracts with advertising agencies to perform "voice overs," *i.e.*, announcing, in producing commercials, but has no role whatsoever in selecting the content of the commercials or the stations over which they will be aired. Tr. 91-97, 188-189. Consequently, this business has far less possible impact upon the Commission's diversification objectives of "maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest" than advertising firms, which are not themselves media of mass communications and which have only a remote potential for media concentration or conflict of interest. *See Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1221 (Rev. Bd. 1984).

6. Next, we have considered the attack on Jarad's ability to effectuate Mr. Morey's full-time station management commitment and have found it equally wanting in merit. The exceptors essentially point to Mr. Morey's great success in the "voice over" business and a 1980 press interview (held 3 years before the Jarad application was filed) in which he stated that he had no intention to "forsake his commercial career" (Tr. 99) and speculate that he will not be able to devote the 40-hours per week to station management requisite for full-time credit. However, Mr. Morey's present intentions were made clear on the record. He stated that he is "prepared to completely abandon [his] present career as a free lance announcer to fulfill [his] commitment as the general manager of the station." Jarad Exh. 1 at 5. On cross-examination, he steadfastly affirmed this pledge to reduce his time commitment to free-lance announcing, including totally abandoning that career if needed, in order to manage the proposed station. Tr. 99-105, 116. The corporate work for R.J. Morey, Inc. is handled by an accounting firm and a bookkeeper, and the corporation would continue to receive payments for commercials which were made previously but which continue to run. Tr. 187-88. In short, Mr. Morey's plan to assure his ability to effectuate his proposal is uncontradicted by any record evidence and is credible; we therefore affirm the ALJ's award of 100% full-time credit to Jarad. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586 (Rev. Bd. 1982) *(subsequent history omitted)*.[3]

7. With respect to the challenges concerning Mr. Morey's claimed minority status as an American Indian we initially note the Commission's recently-enunciated position in its Brief filed September 12, 1986, before the United States Court of Appeals for the District of Columbia Circuit in *James U. Steele v. FCC*, No. 84-1176 (D.C. Cir.) (rehearing *en banc*). Therein, the Commission has succinctly declared that, in light of the Supreme Court's opinion in *Wygant v. Jackson Bd. of Educ., U.S.*, 90 L.Ed.2d 260 (1986), its current policy of awarding comparative preferences for integrated minority and female owner-applicants may be unconstitutional and unauthorized by the Communications Act. Nevertheless, in light of the posture of this proceeding, and the heavy reliance placed upon minority and female preferences by the applicants herein, we have fully reviewed this comparative consideration in reaching our decision. However, as will be shown, these claimed preferences are non-decisional in any event, and absent any minority preferences Jarad's winning margin would only be further widened. Specifically, Jarad (even prior to the filing of the Commission's Brief in *Steele*, *supra*) would not be entitled to any minority preference. We begin our supporting analysis by pointing out that in its *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978), the Commission observed that the views of racial minorities were underrepresented in the broadcast media and that these minorities included American Indians. *Id. at n. 8.* The Commission's Annual Employment Report, Form 395, provides for reporting American Indians whenever such persons are employed (*see FCC Form 395-EEO*, 70 FCC 2d 1466 (1979)), and our rules require that equal employment opportunities be provided for American Indians and other minorities. Section 73.2080(c).

8. The instructions to Form 395 define an "American Indian or Alaskan Native" as "a person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition." While several exceptors challenge this definition as being too broad and suggest, for example, that actual tribal membership should be required (GCB Br. at 24; Westplex Br. at 41, n. 11; NSB Br. at 31), we are satisfied that this definition, taken directly from the Commission's actual employment guidelines to applicants, is appropriate. *See also Buckley Broadcasting Corp.*, 72 FCC 2d 326 (1979). Applying this definition, however, we do not believe Jarad has, in fact, established that Morey is an American Indian.

9. Morey grew up in Brantford, Ontario, Canada, a community which was named after Indian Chief Joseph Brant. Jarad Exh. 1, p. 1. Morey testified that his father told him he (the father) was a descendant of Chief Brant of the Sixth Nation's Reserve as a result of one of Brant's daughters marrying a Morey. Tr. 144. Neither he nor his father is registered on the tribal rolls because neither lives on or participates in the activities of the reserve. Tr. 158. Morey claims affiliation with the Mohawk tribe only because his father is a Mohawk. Tr. 157. His mother is not an American Indian. Tr. 144. He has never lived on the Sixth Nation's Reserve and does not know if anyone on the reserve would know who he is. Tr. 154. He testified

that he is "recognized" in his residential and professional communities as an Indian, but conceded that this recognition is based simply on his telling people that he is an Indian. Tr. 154-6.

10. In short, Jarad's claim that Morey has origins and maintains cultural identification as an Indian through tribal affiliation or community recognition is based solely on what he has told others or what his father told him. Jarad did not substantiate this claim through any form of documentation such as a birth certificate, tribal records, certification by a government agency, or other written evidence of geneology. Because Jarad's entitlement to minority credit was not self-evident, its claim was challenged at the hearing and we believe Jarad had the burden of coming forth with something more than Mr. Morey's memory and belief to support its claim. We do not hold that the record establishes that Morey is not an Indian but only that it does not establish that he *is* an Indian. Clearly, it was Jarad's burden, as the applicant seeking credit, to authenticate its claim, when challenged, with specific and persuasive evidence.[4] Since it did not do so, Jarad will not be awarded minority enhancement credit.

11. *Spectron.* The ALJ credited Spectron with 100% full-time credit for the proposed integration of its sole voting stockholder (31 shares), Angela Shaw, as general manager of the proposed station, qualitatively enhanced by her past and future service area residence, her prior civic activities, and past broadcast experience, as well as by her status as a black and female owner who will participate in station management. Neither Spectron nor Ms. Shaw has any attributable mass media ownership interests. *I.D.*, paras. 20-33, 169. The ALJ found that on March 18, 1983, Spectron created two classes of stock, voting and non-voting, and that Spectron has the following non-voting stockholders: Angela Shaw (owning 18 of 64 non-voting shares issued and outstanding), Roland H. Davis (22 shares), Briding Newell (15 shares), Frances Hooks (5 shares), James M. Shuart (2 shares), and LuNell Anderson (2 shares). *Id.*, paras. 24-25. The ALJ found that Mr. Davis will devote from 10 to 20 hours each week to the proposed station, including serving on three policy committees: The Editorial Policy Committee, The Community Affairs Committee, and The Programming Committee. *Id.*, para. 29. Ms. Newell will also serve on these committees and will devote approximately 10 hours per week to the station. *Id.*, para. 30. Mr. Shuart, the president of Hofstra University, will serve on the committees, but no time commitment to the station was specified for him. *Id.*, para. 31.

12. In addition, as a result of an agreement entered into with Spectron on or about May 23, 1983, Francesco Galesi, in exchange for his financial support, acquired an option to purchase 10 shares of Spectron stock and a right of first refusal to purchase up to 51 additional shares of Spectron stock. Although the agreement did not specify whether Galesi's stock option was for voting or non-voting stock, the ALJ found that the intent of the parties was to make available to Mr. Galesi only non-voting stock. *Id.*, n. 8. Mr. Galesi's rights to acquire stock were subsequently assigned to his wife, Marina Wolkonsky. *Id.*, para. 26.

13. Various exceptions challenge the ALJ's award of 100% quantitative integration credit to Spectron based on the untimely amending of its certificate of incorporation to authorize the issuance of non-voting stock,[5] the active role in station management and policy-making of certain of its non-voting stockholders, the Galesi-Wolkonsky loan agreement (which at one point allegedly contemplated the issuance of voting stock to Mr. Galesi in return for certain financing guarantees), and the lack of credibility of Shaw's integration proposal due to her many errors made in testifying upon cross-examination about Spectron's corporate structure and records. Jarad Br. at 3-19; GCB Br. at 9-17; Westplex Br. at 21-29; North Shore Br. at 14-18, 21-24; DVI Br. at 22-29; WINK Br. at 17-21; and Fonic Br. at 3. Spectron responds that under New York State law it is a validly-formed corporation with two classes of stock, its voting class being solely owned by Ms. Shaw. Reply at 4-9. It claims that Ms. Shaw is, in fact, in "*total* control of Spectron." *Id.* at 9. Finally, it urges that Mr. Galesi and Ms. Wolkonsky "have not exercised any control whatsoever upon Spectron." *Id.* at 10.

14. We agree with the exceptors that various factors deprive Spectron of the full quantitative integration credit it seeks. First, although Angela Shaw is Spectron's putative 100% sole voting stockholder, her cross-examination on October 23-24, 1984 revealed both her lack of knowledge and her passivity concerning many significant aspects of the Spectron application. For example, Ms. Shaw (an attorney formerly employed by the Federal Communications Commission) initially testified that she thought she owned forty shares of voting stock which were authorized to be issued to her at the March 18, 1983 board of directors/stockholders meetings. Tr. 405, 416-417. However, she was not certain because Spectron's local counsel "took care of that." Tr. 417. Each share of stock cost $1, and she testified she paid $40 for her stock. Tr. 418. She did not know how Spectron decided to allocate "voting" and "non-voting" shares among the stockholders because "the lawyer decides." Tr. 418-419. She was only interested in the "percentage" of shares that she and the other stockholders would own and "not the number of shares," because "you can always change the numbers." Tr. 419. She also thought she had been issued some non-voting shares at the initial board meeting. Tr. 405, 437. She claimed that, as indicated in the application as originally filed on May 16, 1983, she owned 46.7% of the equity, but did not know what that percentage was based upon. Tr. 428; see Jarad Ex. 6.

15. Although this former Commission attorney certified the application as being accurate and complete, she did not verify it from personal knowledge but instead relied totally upon her attorneys. Tr. 428. She was not concerned that the application as originally filed did not list any non-voting stock that she claimed she owned because she "trusted the lawyers" and because she regarded it as an unimportant technical matter, just as long as "the percentages stayed the same." Tr. 438. After initially assuming that both classes of Spectron stock were "equity," she changed her opinion and thought that only the *non-voting* stock represented equity. Tr. 424, 435. Although it became clear on cross-examination that the number of shares and percentage ownership of shares did not add up properly, she strongly denied that the missing shares reflected ten shares of stock which might have been under option to Francesco Galesi, Spectron's financial backer, because that option did not come into being until later, after the application was filed. Tr. 491-492.

16. Upon the recall of Ms. Shaw for redirect (and recross) examination on November 9, 1984, Spectron established that she owned 31 shares (rather than 40) of voting stock which were authorized to be issued to her at the initial board of directors meeting and an additional 18 shares of non-voting stock which were subsequently acquired. Her non-voting stock originated as voting stock issued to Thomas Morrison, was later made "nonvoting," and was subsequently transferred to her pursuant to a

December 2, 1983 board of directors resolution. Spectron Exs. 13-17; Tr. 3181-3200. Ms. Shaw revised her earlier testimony that voting stock did not represent equity (Tr. 435) and reverted back to her original claim (Tr. 424) that each share of voting or non-voting stock represented one share of equity. Tr. 3213-3216. Her stock represents 52% of Spectron's equity. Tr. 3186. She testified that she had no role in maintaining Spectron's records, and that corporate secretary Briding Newell and Spectron's local counsel are in total control of those documents. Tr. 3216-3217. She regularly reviews corporate documents only at board and stockholder meetings, when all the other directors and stockholders also have an equal opportunity to review them. Tr. 3217. Also, it was revealed that at the initial stockholders meeting held on March 18, 1983, Francesco Galesi signed an "offer to purchase 10 shares" of Spectron common stock for $10. Spectron Ex. 13 at 14. The same hearing exhibit indicates that the other "voting" and "non-voting" shareholders present at the meeting signed similar agreements. However, Galesi's name does not appear on the Spectron stock ledger, Jarad Ex. 15, which also lists Ms. Shaw as owning 40 shares (as she originally testified) and which does not distinguish between "voting" and "non-voting" shares. A stock certificate for 10 shares was issued to Mr. Galesi but apparently was subsequently cancelled. Jarad Ex. 16 at 8-9 (stock certificate number 5).[6]

17. Furthermore, the record evidence shows that there are great similarities between the voting and non-voting classes of stock of Spectron. Each share was purchased for $1, Tr. 417, and thus the sale of the 95 shares of authorized and issued stock represents $95 in capital proceeds, a rather insignificant sum compared to the funds needed to prosecute the application through hearing, let alone construct a station. As indicated previously, all of Spectron's stock was initially "voting" stock until the board of directors and shareholders meetings were held on March 18, 1983, when the stock was subdivided into two classes, with the only distinction between them being the putative presence or absence of voting rights. Ms. Shaw testified that at the March 18 meetings, Spectron's lawyers decided upon the number of shares and class of stock to be distributed among the various stockholders, Tr. 418-419, after first determining which shareholders could devote full time to the station and after considering how to take advantage of the Commission's minority and female qualitative enhancement policy. Tr. 624-626. No independent business purpose, other than maximizing an ownership integration preference, is evident from the record for Spectron's decision to create voting and non-voting classes of stock. Presumably, such a purpose also fully accounts for the subsequent reclassification of Mr. Morrison's 18 shares of stock as "non-voting" and, quite possibly, for its ultimate transfer to Ms. Shaw.

18. In addition, three of Spectron's purported non-voting shareholders are proposed to serve on station policy committees, and two of them will devote significant amounts of time to the station on a regular basis. See paragraph 11, *supra*. Ms. Briding Newell, who owns 15 shares of Spectron stock (*I.D.*, para. 25), has proposed:

> "[T]o devote approximately 10 hours per week to the day-to-day operation of the station...on the Community Affairs, Editorial Policy and Programming Committees...with special emphasis on the Programming Committee. [She] intends to particularly focus on the development of news programming for the station...."

Spectron Ex. 4 at 6-7. She is also a director and officer of Spectron, Tr. 193, and is the only person other than Spectron's local counsel who has maintained Spectron's corporate records. Tr. 3216. She will reduce her time spent on other activities to assure that she can in fact keep her promise to devote 10 hours per week to the station. Tr. 239-240. She expects not only to participate in making the decisions of the committees, but also to have some supervisory responsibilities in implementing the decisions. Tr. 241-242. Similarly, Mr. Roland H. Davis, who owns 22 shares of "non-voting" stock (*I.D.*), para. 25) testified:

> "I intend to be involved in an ongoing fashion with the operations and activities of the stations. I will serve, along with Spectron shareholders Angela Shaw, Briding Newell and James Shuart, on the Editorial Policy, Community Affairs and Programming Committees...to which I will devote from 10 to 20 hours each week.... I believe my experience in the community and the insights which I have into the workings of the local governments and various civic and community organizations will permit me to make a special contribution to the station in terms of the development of local and public affairs programming, as well as in the creation of special opportunities for civic involvement by the station...."

Spectron Ex. 3 at 6-7. However, on cross-examination Davis stated that he would not be involved with station operations but would be serving largely in an advisory capacity on the three committees and on the board of directors. Tr. 300-305. Nevertheless, he affirmed that he would be involved in policy-making, Tr. 306-307, and that he, Briding Newell, and Angela Shaw each had one vote on the board of directors, which has the power to hire and fire officers of the company. Tr. 328-330. This active managerial and policy-making involvement of at least two of Spectron's "non-voting" shareholders, by itself, is sufficient to decisionally diminish the ownership integration credit due Spectron, because their involvement significantly dilutes the degree of exclusive authority to manage and control the corporation and operation of the station ostensibly held by the sole "voting" shareholder, Ms. Shaw. *See Signal Ministries, Inc.*, FCC 86R-50, released August 18, 1986, paras. 13-16.[7]

19. Finally, we find that the Galesi-Wolkonsky loan agreement further weakens Spectron's integration posture. Francesco Galesi is a friend of Ms. Shaw and had expressed an interest in supporting her business ventures. Tr. 562, 648-649, 3106-3107. Before Spectron's application was filed, Shaw and Galesi discussed the possibility of Galesi providing funds to prosecute the application. Tr. 560-562, 3106-3107. Shaw and George W. Bott, a vice president of the Galesi Group, had had a draft agreement prepared between Spectron and Galesi. Jarad Ex. 13. Under the draft agreement, Galesi would deliver $10,000 cash to Spectron and could be required to guarantee unconditionally up to $250,000 in repayments to Spectron's lenders. *Id.* at 3. In return, Galesi would receive a non-negotiable note with the option to convert the note into 33 shares of Spectron non-voting stock. *Id.* at 8. The draft agreement and promissory note used the term "non-voting stock" seventeen times.

20. However, the draft agreement was not executed. After further negotiation, the parties signed a loan agreement on May 23, 1983, one week after the Spectron application was filed and over two months subsequent to the

board/stockholders meeting at which Galesi signified his intent to purchase 10 shares of Spectron stock. Jarad Ex. 8. The agreement calls for Galesi to lend Spectron $10,000 in return for a note and "an option to purchase up to ten (10) shares of Common stock" at the price of $1 per share. *Id. at 1, 7.* Galesi also obtained a right of first refusal to purchase an additional 51 shares of common stock at a price of $4,902 per share. *Id.at 8.* Nowhere in the agreement was "non-voting" stock mentioned. Indeed, Spectron warranted that: "There are no outstanding agreements relating to the voting...of any shares of capital stock of the Company." *Id.at 3.* Thus, the terms of the loan agreement clearly imply that Galesi would receive *voting* stock. However, on December 2, 1983 (one week before the "B" cut-off date), Galesi assigned his interest to his wife, Marina Wolkonsky. *I.D.*, para. 26. In return for financial advances pursuant to the May 23, 1983 loan agreement - which covers almost all of Spectron's expenses to date (Tr. 536-544) - Ms. Wolkonsky obtained promissory notes from Spectron on or about March 8, 1984 (for $29,412) and July 1, 1984 ($24,510). Spectron Exs. 11, 12. The documentation provides that Ms. Wolkonsky may at her option redeem the notes for 6 and 5 shares, respectively, of "non-voting" stock. Nevertheless, in view of the clear intent of the May 23, 1983 loan agreement not to limit the option to "non-voting" stock, we cannot be assured Ms. Wolkonsky will not obtain voting stock when she ultimately redeems her notes, which would obviously occur at a time subsequent to grant of the Spectron application. Accordingly, the provisions of the May 23, 1983 loan agreement further serve to weaken Spectron's integration proposal.

21. In summary, numerous deficiencies in Spectron's proposal preclude us from awarding it the full 100% integration credit it seeks. Of its five non-voting stockholders other than Ms. Shaw, two sit in its three-person Board of Directors and will also be active in managing the station on a daily basis through their participation on three policy-making committees, and a third will also sit on these committees. Their participation dilutes the credit Ms. Shaw might otherwise be entitled to. *See Signal Ministries, Inc., supra*, and cases cited therein at para. 15. We also cannot be certain that the Galesi option agreement would not ultimately result, for the reasons discussed above, in the transfer of voting stock to Ms. Wolkonsky, thereby further reducing the exclusivity of Ms. Shaw's corporate control. Nor are we content, on the basis of the state of her own confused testimony, that Ms. Shaw will exercise the control Spectron claims for her. As we have said many times, it is not sufficient for an applicant seeking integration credit to maintain, as Spectron does here, that it has created its business entity in conformity with local governing law. *See, e.g., Bradley, Hand and Triplett*, 89 FCC 2d 657, 662-63 (Rev. Bd. 1982). To carry out the purposes of our comparative policies, we may look beyond formal corporate structure in order to ascertain where true ownership and control rests, *KIST Corp.*, 58 RR 2d 1483 (1985), and diminish integration credit accordingly when "non-voting" owners partake in management. Some exceptors contend that Spectron's credit must be reduced to at best 52% because that figure represents Ms. Shaw's percentage of Spectron equity, noting that she is the only stockholder proposing to work full time, whereas others would reject its proposal as completely unreliable and award no credit. We need not decide between these theories, however, since it is plain that in either case Spectron is not entitled to credit approaching the 100% awarded to other applicants, and is, in essence, eliminated from further comparative contention.

22. *GCB*. The ALJ credited GCB with 99% quantitative integration credit for the full-time participation of John Betaudier and Yvonne Betaudier, 53% joint owners, as general manager and vice president for station affairs, respectively; Phyllis Bernstein (30% owner) as news director; Betty Sutter (14% owner) as comptroller and business manager; and Edwin A. Bernstein (2% owner) as sales manager. This integration proposal was qualitatively enhanced by the current service area residence of the Bernsteins and Mrs. Sutter, representing *in toto* 46% ownership, plus the proposed future local residence of the Betaudiers (53%); 16% credit for the civic participation of Mrs. Sutter and Mr. Bernstein; 28.5% credit for the broadcast experience of Mssrs. Betaudier and Bernstein; 53% credit for the participation of minority ownership (the Betaudiers) in management; and 70.5% credit for participating female ownership (Mmes. Betaudier, Bernstein, and Sutter). *I.D.*, paras. 35-54, 170-175.

23. In its exceptions, GCB seeks additional 30% enhancement credit under the civic participation and broadcast experience rubrics for Ms. Bernstein. GCB Br. at 31-33. We will deny these exceptions. GCB presents us with a bare claim, unsupported by any record citation, *cf.* 47 CFR 1.277(a) (exceptions "shall point out with particularity alleged material errors...and shall contain specific references to the page or pages of the transcript of hearing, exhibit or order if any on which the exception is based"), that Mrs. Bernstein has obtained "extensive knowledge of and interest in Long Island affairs gained after years of practicing her trade [which] qualifies her for civic participation credit." GCB Br. at 32. However, her testimony simply shows that: (1) she has been a freelance journalist for the past eight years who has had published many by-lined articles in The New York Times and in other media; (2) she worked during portions of 1968, 1969, and 1972 for UPI in New York City as a reporter on the city desk; (3) she performed public relations and media contact work for the Spanish National Tourist Office in New York City; (4) she has on four occasions since 1979 taught a "Selling the Freelance Story" course at Adelphi University and in 1983 taught a 3-credit journalism course at the Polytechnic Institute of New York in Farmingdale; and (5) in 1974, she was the Leisure Editor of the Long Island Business Review, which experience she claims gave her "strong familiarity on all levels with the Long Island scene." GCB Ex. 3 at 2-3. This testimony fails to substantiate GCB's essential claim that Ms. Bernstein has sufficient "local activities indicating a knowledge of and interest in the welfare" of the service area, GCB Br. at 33 (*citing Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965)). *See also Broadcast Associates of Colorado*, 59 RR 2d 741, 743 (Rev. Bd. 1985) (local activities resulting from an individual's occupation are generally less significant under the civic participation sub-factor than active membership in community organizations and participation in leadership roles), *reversed on other grounds*, 60 RR 2d 721 (1986). As for her claim to broadcast experience, her testimony fails to show that she has either had "hands-on" broadcast station experience, or worked in a position that was significantly broadcast-related in the industry. Therefore, we will not award GCB any further broadcast experience credit. *See Phoenix Media Corp.*, 56 RR 2d 1241, 1248-1249 (Rev. Bd. 1984), *review denied*, FCC 85-435, released August 6, 1985.

24. Other exceptions urge that quantitative credit for the GCB integration proposal should be significantly diminished because putative 2% shareholder Edwin Bernstein, and not the Betaudiers (53%), in reality dominates GCB. NSB Br. at 35-40; WINK Br. at 23-25. NSB also challenges the award of integration credit to Betty Sutter, a 14% owner and GCB's proposed full-time comptroller and business manager. NSB Br. at 40-41. We reject these contentions. The ALJ did indeed find that Mr. Bernstein was the driving force behind formation of the GCB application. The exceptors, however, have been unable to point to evidence that would undercut the ALJ's holding that despite Mr. Bernstein's active role, he acted in concert with the other stockholders and that all actions taken were unanimously agreed to or ratified by the others. *I.D.*, para. 173. The ALJ's conclusion is further supported by evidence showing all GCB stockholders have paid for their shares, that five out of the six GCB stockholders will be integrated in management positions at the station, that the Bernsteins have known the Betaudiers and the Sutters for many years, that Mr. Betaudier, who is proposed as general manager, has extensive broadcast experience, and will receive a higher salary than the others because of his greater responsibilities, that Mrs. Betaudier and Mrs. Sutter are proposed for significant managerial positions, and that Mrs. Sutter currently co-owns and manages an office building. Thus, we cannot conclude that the GCB applicant is a sham and the Betaudiers mere figureheads without actual authority.

25. However, GCB finishes behind Jarad in any event. Specifically, Jarad's integration proposal, with 100% qualitative credits for service area residence, civic participation, and broadcast experience, is superior to GCB's proposal as credited in the *I.D.*, with 46% service area residence credit (plus slight credit for the proposed future local residence of 53% more of its ownership), 16% civic participation credit, 28.5% broadcast experience credit, 53% minority ownership participation credit and 70.5% female ownership participation credit (*but see* para. 7, *supra*). In particular, although Jarad's substantial local residence advantage (100% vs. 46%) is equalled by GCB's substantial minority preference (53% vs. 0%), *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), its two other substantial preferences, for civic participation and broadcast experience, outweigh GCB's single substantial preference for female ownership, which is now constitutionally suspect. *See* para. 7, *supra*. *See also Talleyrand Broadcasting*, 103 FCC 2d 476, 480, 481 (Rev. Bd. 1985) (proposed future local residence is insignificant in comparison to long-term service area residence; and 100% to 49% edge for female participation "probably offset" by moderate civic participation advantage alone albeit female credit withheld pending clarification of Commission policy).

26. *Westplex*. The ALJ found that Westplex is a limited partnership whose two general partners, Kenneth L. Herring (51% control) and Ramona Rivera (49% control), will serve full-time as programming manager and general manager, respectively, of the proposed station. Westplex was awarded 100% integration credit enhanced qualitatively by 100% credits for the general partners' long-term past service area residence, their promises to move to the proposed community of license, their "extensive" past broadcast experience, and their status as participating minority owners; 51% credit for Mr. Herring's civic participation; and 49% credit for participating female ownership (Ms. Rivera). *I.D.*, paras. 56-71, 176-179. Westplex also received a very slight comparative demerit under the factor of diversification of mass media control because only after the "B" cut-off date did Mr. Herring make an unequivocal promise to terminate his current employment as program director of Station WTHE(AM), Mineola, New York, which serves substantially the same area as Westplex's proposed station. *Id.*, para. 177.

27. Challenging the award of 100% quantitative integration credit to Westplex, various exceptors assert: (1) Westplex is not a valid limited partnership under New York State law or the Uniform Limited Partnership Act and did not have an executed limited partnership agreement until after the hearing exhibit exchange date, and its limited partners are not sufficiently passive and insulated from station affairs to be ignored in the comparative evaluation; (2) Westplex proposes an impermissible transfer of control because, after the "A" cut-off date, it added a new 49% general partner, Ramona Rivera, to whom it has also given an option to become a 51% and controlling general partner one year after final grant of its application and who even now effectively controls the applicant; and (3) its general partners cannot effectuate their integration proposals. Jarad Br. at 32-42; Spectron Br. at 12-19; GCB Br. at 27-31; NSB Br. at 41-43; WINK Br. at 25-27; and McComas Br. at 11-12. Westplex responded to these arguments. Reply at 2-21. For reasons that follow, we find that Westplex's untimely execution of its limited partnership agreement requires that the quantitative integration credit awarded to it in the *I.D.* be eliminated.

28. Westplex evolved as follows. A certificate of limited partnership, which did not describe whatsoever the control relationships amongst the various limited and general partners, was filed on July 26, 1983 at the Nassau County courthouse. DVI Ex. 5. Prior to December 9, 1983 (the "B" cut-off date in this proceeding), the partners were negotiating the admission of Ms. Rivera as a 49% general partner and considered a draft Memorandum of Understanding to be used as a basis for entering a limited partnership agreement, but they never signed the memorandum. Jarad Ex. 12. The hearing sessions in this proceeding began October 22, 1984, *I.D.*, para. 3, and Westplex finally completed the process of having its partners execute a limited partnership agreement on November 8, but did not produce this document until July 14, 1986. Westplex Errata to Opp. to Jarad Contingent Mot. to Reopen the Record and Enlarge Issues, filed July 14, 1986, Appendix A at 36, 40.

29. In *Houston Family TV, Ltd.*, 101 FCC 2d 661, 668 (Rev. Bd. 1985), we recently held:

> "Oral understandings, stock options, and other inchoate ownership arrangements, until finalized, simply do not provide the type of 'reasonable assurance' that *Bradley, Hand and Triplett*[, 89 FCC 2d 657, 662 (Rev. Bd. 1982),] requires as an underpinning for ownership integration credit. To rule otherwise would permit a corporate applicant...to hypothesize a formidable integration proposal in its application, *sans* any binding ownership commitment, and then try to scare off comparative competition. If, as in the instant proceeding, its application appeared likely to prevail, it could demand stock subscriptions and purchases; on the other hand, if it came a cropper, the putative integrated principals could bail out without making any investment. The Commission cannot countenance such integration gamesmanship.

> A timely binding subscription agreement is the minimum price of admission for quantitative ownership integration credit."

Precisely the same considerations apply here. The limited partnership form is a malleable vehicle that can transmute a given ownership equity structure into a radically different and much more favorable ownership integration structure. Until a binding limited partnership agreement is signed, the applicant's structure is as inchoate as any other "oral understanding." Therefore, we hold that, for Westplex, the "minimum price of admission for quantitative ownership integration credit" was a binding, detailed limited partnership agreement submitted by the time set by the presiding officer for the exchange of integration proposals.[8] *See id.at 667.* Westplex clearly failed this test; accordingly, it will be awarded no integration credit.[9]

30. *NSB.* The ALJ credited NSB for the 100% full-time integration of Gerald T. Reilly, 51% general partner, as general manager of the proposed station; Joel Mahan, 24.5% general partner, as programming manager; and Leonard Yam, 24.5% general partner, as assistant general manager who will direct community relations matters. The proposal was qualitatively enhanced by 100% credit for the broadcast experience of the three principals and 49% minority ownership credit for Mahan and Yam. In addition, NSB was charged with a very slight demerit because Mr. Reilly is general sales manager for a low power television (LPTV) station licensed to Plainview, Long Island, and did not state that he would leave that position if the NSB application were granted. *I.D.*, paras. 73-83, 180-182, 204-205.

31. In its exceptions, NSB avers that the ALJ erred in assigning it a diversification demerit because its failure to state that Mr. Reilly would terminate his current LPTV position was "unwitting" and "an inadvertent oversight." NSB Br. at 90. It also claims that the ALJ awarded it insufficient qualitative enhancement credit under the integration factor. Specifically, it states that, despite the "51/24.5/24.5 split" among the three partners in case of a liquidation of NSB, they are "equal general partners" with respect to "their financial interest and liability in the station as a *going concern*" and in terms of their "legal responsibility while they operate the station." *Id.* at 10. Asking that we view each general partner as having one-third control of NSB, the applicant seeks 66.7% minority ownership credit for Mahan and Yam, local residence credit of 100%, and civic participation credit of 66.7%. *Id. at 10-13.*

32. We shall first address NSB's integration exceptions. We disagree that NSB has adequately shown that each of its partners has one third control and that therefore it should be awarded 66.7% minority ownership enhancement credit. In its application, NSB stated its ownership to be, Reilly 51%, Yam 24.5%, Mahan 24.5%, and this representation was carried forward in its hearing exhibit no. 2, where it stated that "the ownership terms of the general partnership are as follows: Reilly 51%, Mahan 24.5%, Yam 24.5%." In view of these express representations, we cannot now allow the applicant to attempt to rely exclusively on its oral hearing testimony, which is at variance not only with its application but also with its written hearing exhibit, to bolster its enhancement position. In *WHW Enterprises, Inc.*, 89 FCC 2d 799, 816 (Rev. Bd. 1982) (subsequent history omitted), we looked to voting control as spelled out in the partnership agreement to determine integration credit. Consistent with that approach, the ALJ here relied on the written evidence put forth by the applicant to support his analysis. We concur.

33. As the ALJ recognized, Mr. Yam resided in Westbury, New York, from 1970 through 1981, and since 1981 has resided in Elmhurst. *I.D.*, para. 80; NSB Ex. 4 at 2. Both Westbury and Elmhurst lie within the proposed service area, *see* Westplex Ex. 6 at 2, and therefore NSB is certainly entitled to 24.5% credit for long-term service area residence. Mr. Reilly resided in the service area from birth until the age of three or four, attended college there, and has for the past two years worked but not resided within the service area. *I.D.*, para. 80; Tr. 1503. We recognize a slight credit for Mr. Reilly's tenuous connection with the service area, but find it to be a substantially less important nexus than the long-term and current service area residence of Jarad's Mr. Morey. Service area residence which occurs during the earliest years of life, when one's cognitive abilities are just beginning to grow, does little to significantly further one's knowledge of, or appreciation for, the needs and problems of the service area - the very purpose for which the Commission recognizes local residence as an enhancing attribute. *See Policy Statement, supra,* 1 FCC 2d at 395-396. Finally, Mr. Mahan's connection with the service area stems from and apparently ends with, his attending college there, *I.D.*, para. 83; NSB Exs. 5, 5A; *see* NSB Br. at 12, and deserves a slight credit. After weighing the 24.5% long-term service area residence credit for Mr. Yam plus the slight credits for Reilly and Mahan against the 100% long-term service area residence of Jarad's Mr. Morey, we award Jarad a substantial preference over NSB under the local residence enhancement factor.[10]

34. Next, we find NSB's claim for civic participation credit for Yam and Mahan to be weak. Basically, NSB claims that while attending college, Mr. Yam "was involved in broadcasting activities, including shows dealing with political and civic affairs." NSB Br. at 11. Likewise, Mr. Mahon became acquainted with - but did not join or participate in - community organizations, as part of his collegiate experience at the campus radio station and an area cable television company. *Id.at 12.* These activities appear to have been incidental to their work experiences and, in any event, were too tenuous to receive significant credit. In our view, Jarad merits at least a moderate preference over NSB for civic participation.

35. We also point out that, although the ALJ awarded both Jarad and NSB 100% credit for broadcast experience, Jarad has a qualitative edge here too. NSB's Mr. Reilly has been general sales manager of an LPTV station since April 1984 and was an account executive in sales for a radio station from August 1983 until February 1984. *I.D.*, para. 81. From 1982 to 1984, he was employed part-time to locate LPTV stations for Bogner Broadcasting and to negotiate their purchase and construction. *Id.* Mr. Yam's total broadcast experience occurred while at college at the campus radio station and during two 3-month internships with New York City radio stations, involving two or three days a week. *Id.*, para. 82. Mr. Mahan's broadcast experience also began at his campus radio station and has involved part-time positions at Cablevision from January to May 1981, and at NBC in New York, since September 1984. *Id.*, para. 83. Thus, the broadcast experience of NSB's principals is relatively short in duration and predominantly part-time or college-related. By contrast, Jarad's Mr. Morey has been involved with broadcasting since 1964, although predominantly as an announcer. *Id.*, paras. 16-17.

Therefore, Jarad merits at least a slight preference for broadcast experience. Although NSB would have a substantial minority ownership preference for a 49% to 0% advantage (*but see* para. 7, *supra*), that preference would be fully counterbalanced by Jarad's substantial local residence preference. *See Radio Jonesboro, supra*, 100 FCC 2d at 945. Jarad, having additionally at least moderate civic participation and slight broadcast experience preferences, is entitled to a slight, but decisive, overall integration preference over NSB. *See id.*, 96 FCC 2d 1106, 1112 (Rev. Bd. 1984), *aff'd*, 100 FCC 2d 941, 948 (1985).

36. We also deny NSB's diversification exception. NSB does not dispute that it revealed that Mr. Reilly would resign his general sales manager position at a nearby LPTV station after the "B" cut-off date in this proceeding. Accordingly, because its divestiture announcement came too late, a very slight diversification demerit was properly assessed against it. *See Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 446 (Rev. Bd. 1985), *review denied*, 59 RR 2d 1267 (1986).

37. *DVI.* The ALJ found that although neither DVI nor its sole stockholder, Byron E. Lewis, has any ownership interest in other broadcast stations, it must nevertheless be assessed a slight diversification demerit because Mr. Lewis is a 51% stockholder in Uniworld Group, Inc. (Uniworld), a New York City-based marketing company. Uniworld, which serves at times as a conventional advertising agency, placed $20 million in advertising in the last year and has bought time from broadcast stations whose signals cover DVI's proposed service area. Mr. Lewis does not propose to divest his ownership interest in Uniworld. *I.D.*, paras. 85-90, 97, 183. With respect to the integration factor, the ALJ found that although Mr. Lewis proposed to devote 40 or more hours per week as full-time general manager of DVI's proposed station, he would not be able to effectuate this full-time promise in light of other commitments to work 20 hours per week at Uniworld and to continue to devote 10 hours per week to another DVI business venture aimed at developing the Harlem district of New York City as a tourist and cultural center. The ALJ therefore awarded DVI 100% part-time credit. *Id.*, paras. 91-93, 184-185. DVI also received qualitative enhancement credit for Mr. Lewis' past long-term service area residence, proposed future local residence, civic participation, and minority status, as well as a slight credit for Mr. Lewis' familiarity with radio station production operations. *Id.*, paras. 94-96, 186.

38. In its exceptions, DVI argues that it should have been awarded 100% full-time integration credit because Mr. Lewis' testimony allegedly shows that he will be able to effectuate his full-time proposal by reducing the time he typically spends on outside interests to 4-5 hours per week and, even under extreme circumstances, he would devote no more than 20 hours a week to outside activities. DVI Br. at 4-14. We deny this exception.

39. Mr. Lewis is, and intends to maintain his position as, Chairman, Chief Executive Officer (CEO), and majority stockholder of Uniworld. DVI Exh. 1 at 1; Tr. 2056-2057, 2077. Although he indicated in pre-hearing answers to interrogatories that he would discontinue his positions as Chairman and CEO, he testified at hearing (Tr. 2077) as follows:

> "I reassessed my position. I thought about having built the company for 15 years with my sweat and I believed that there was an easy opportunity to maintain my position as chairman, [CEO] with my control of the company and also have more than enough time to work at the radio station."

This change of heart is quite understandable, given that Uniworld is a substantial business which employs some 45 individuals, places approximately $20 million a year in advertising, and earns about $3 million in fees *per annum*. Tr. 2030, 2167-2169. In order to reduce his Uniworld activities, which then required significantly more than 40 hours per week of his time, Lewis had, approximately a year ago, hired a president to run Uniworld's day-to-day operations; nevertheless, he has continued to work a full 40-hour week at Uniworld. DVI Exh. 1 at 1; Tr. 2040-2051. Lewis is the person in charge at Uniworld, having hired the company's president and key employees with whom he maintains daily contact. Tr. 2040-2051. He fired the former president because "he couldn't do the job." Tr. 2066.

40. To further reduce his future time commitment to Uniworld to "no more than 20 hours per week," DVI Exh. 1 at 1, Mr. Lewis hopes and anticipates that the management team he has assembled will be able to handle Uniworld's admittedly "volatile" business, enabling him to spend as little as 7-8 hours per week (including a weekly 4-5 hour executive committee meeting) at Uniworld. Tr. 2057-2066. He testified that in case of very serious financial difficulty at Uniworld, he might have to spend 10 or 15 hours a week there. Tr. 2063. However, when asked whether he could foresee any situations in which he might have to spend more than 20 hours a week at Uniworld, he responded: "The only likelihood would be the extreme catastrophe [i.e., very serious financial difficulty] that was mentioned before." Tr. 2078. Nevertheless, he expects to work at the proposed station at least 40 hours a week because he has a "commitment" to do so. Tr. 2161-2164.

41. Also, Uniworld advertises in *Credits*, which is a magazine distributed to CEOs of major corporations, that Mr. Lewis personally is "closely involved with all of the agency's accounts." Tr. 2115-2126. This advertisement was based on information supplied by Mr. Lewis, who also claimed that the statement is accurate and will remain so. *Id.* However, he further explained that the statement was not intended to mean that he is involved daily with the accounts, but only that he personally knows many of the clients' key people and knows "what is going on" at these companies. *Id.*

42. What clearly emerges from the record evidence cited above is that Uniworld is a substantial business whose creation and success has been significantly due to Mr. Lewis' efforts. He has an important financial and personal interest in Uniworld, will continue to oversee the company regardless of whether DVI obtains the proposed station, and will take whatever steps are needed to assure Uniworld's success. The ALJ was manifestly correct in finding that Mr. Lewis' future time commitment to Uniworld would not involve less than 20 hours per week, especially in view of his written testimony that stated only that "he will devote no more than 20 hours per week" to Uniworld, DVI Exh. 1 at 1. *See Caldwell Broadcasting Corp.*, 100 FCC 2d 115, 125 n. 11 (Rev. Bd. 1985) (commitment expressed in terms of a range of time should be narrowly construed against the applicant), *rev. denied*, FCC 86-245, released May 15, 1986; *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1495 n. 11 (Rev. Bd. 1979), *rev denied*, FCC 79-397, June 21, 1979. In addition, Mr. Lewis' oral

testimony that he actually would work fewer than 20 hours per week at Uniworld was not unequivocal. *Compare* Tr. 2078 *with* Tr. 2057-2066.

43. Also, it is undisputed that Mr. Lewis, as part of another DVI business project, has been devoting, and will continue to devote, 10 hours per week to promoting the development of a tourism program in the Harlem district of Manhattan. Tr. 2094-2102. Therefore, Mr. Lewis' overall proposal is exactly what the ALJ considered it to be: 20 hours per week at Uniworld in Manhattan, 10 hours per week to the Harlem tourism project, and 40 hours per week to the proposed broadcast station in Garden City, *i.e.*, a total work week of at least 70 hours. *See I.D.*, para. 184. Also, the ALJ properly noted that the trip between Garden City and Manhattan is significant in terms of distance and traffic congestion. *Id.*

44. In sum, Mr. Lewis' total time commitment to his various business interests, including commuting time, exceeds the 70-hour per week demarcation of the "outer limits of credibility," *Northern Sun Corp.*, 100 FCC 2d 889, 892 (Rev. Bd. 1985), *recon. denied*, 100 FCC 2d 1440, *rev. denied*, FCC 86-135, released March 28, 1986; *see also Caldwell Broadcasting Corp., supra*, 100 FCC 2d at 125; *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1108 (Rev. Bd. 1984), *rev. denied*, 100 FCC 2d 941 (1985). We find that, despite his stated intention to work full time at the station, Mr. Lewis' commitments to other business ventures are too major an undertaking to warrant our complete confidence that he would *regularly* maintain a full-time, 40-hour per week, work schedule at the station. *See Berryville Broadcasting Co.*, 70 FCC 2d 1, 8-12, 12-13 (Rev. Bd. 1978) (two integration proposals, one involving a 70-hour work week including commuting time, and the other involving 61-71 hours a week in addition to drive time, discounted completely); *see also Washington's Christian TV Outreach*, 99 FCC 2d 395, 417-418 (Rev. Bd. 1984); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). Nevertheless, the ALJ's conclusion that DVI should be accorded part-time credit, which is tantamount to a 20-hour per week commitment to station management, appears reasonable based on the record evidence in this case. But even were DVI accorded 100% "substantial time" credit, which is the type of credit applicable to 30-hour per week integration proposals, *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 953 (Rev. Bd. 1982), *rev. dismissed*, FCC 82I-23, released November 18, 1982, and which is the very most credit we could possibly award here, DVI's integration proposal would still be decisionally behind Jarad's 100% full-time proposal. This is because "[t]o the extent that the time spent moves away from full time, the credit given will drop sharply," *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), and, consequently, full-time integration is "disproportionately superior" to substantial (30-hour per week) integration. *Webster-Baker Broadcasting, supra*, 88 FCC 2d at 956; *see also Big Bend Broadcasters*, 96 FCC 2d 166, 170 (Rev. Bd. 1983); *Tele-Broadcasters of California, Inc.*, 58 RR 2d 223, 232-233 (Rev. Bd. 1985). The resultant clear quantitative difference between the Jarad and DVI integration proposals cannot be overcome by differences in their qualitative attributes. *See Van Buren Community Service*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981).[11]

45. *WINK.* The ALJ found that WINK has no attributable media ownership interests. *I.D.*, para. 187. He awarded WINK 100% full-time credit for the proposed integration of Ronald E. and Winifred C. Graiff, who are husband and wife and who are each 50% owners of WINK, as general manager and station manager, respectively, of the proposed station. *Id.*, paras. 102-104, 188, 205. WINK's integration proposal is qualitatively enhanced by Mrs. Graiff's past long-term service area residence (from 1948 until March 1973), Mr. Graiff's past short-term service area residence (from late 1969 until March 1973), their promise to relocate to Garden City if WINK's application is granted, *id.*, para. 105, 188; Mrs. Graiff's civic participation within the service area, *id.*, paras. 106, 188; and Mr. Graiff's broadcast experience since 1964, *id.*, paras. 107, 188. (The ALJ also awarded WINK 50% female ownership enhancement credit for Mrs. Graiff's participation, *id.*, para. 188, which we will disregard. *See* para. 7, *supra*, and *Talleyrand Broadcasting, supra*.) Finally, although the ALJ recognized that WINK's service area included 6,523,797 people compared to 5,350,585 for the other applicants, he did not award WINK a comparative coverage preference because all covered areas already received service from 18 FM stations and 5 AM stations, and thus were well-served. *Id.*, paras. 10-11, 167.

46. In its exceptions, WINK correctly points out (Br. at 8-10) that, based upon its proposed service to about 1.2 million additional well-served people, it should have been awarded a slight comparative coverage preference. *See Barton Broadcasting Co.*, 60 RR 2d 322, 326-327 (Rev. Bd. 1986) (slight preferences are awarded to applicants having *substantial* overall coverage advantages where the entire service areas are well-served), and cases cited therein.[12]

47. WINK also excepts (Br. at 34-38) to the ALJ's denial of its motion to enlarge issues, filed on May 17, 1984, insofar as it sought the addition of a comparative programming issue, *Memorandum Opinion and Order*, FCC 84M-2853, released June 25, 1984. The ALJ fully considered this motion and held that WINK failed to specifically allege facts showing a substantial or material difference in quality between the respective programming proposals of WINK and the other applicants. *Id.*, para. 4. WINK's exception indicates only that it will respond in a typical way to community needs but fails to make a *prima facie* showing of "superior devotion to public service." *See Chapman Radio and Television Co.*, 7 FCC 2d 213, 214 (1967). Because WINK's exception fails to present a "clear showing of error," *RKO General, Inc. (KHJ-TV)*, 8 FCC 2d 880, 882 (1967), we affirm the ALJ's ruling.

48. In sum, WINK's comparative showing consists of its absence of any diversification demerit, its slight comparative coverage preference, and its 100% full-time quantitative integration credit with appropriate enhancements. In comparison with front-runner Jarad, WINK is decidedly qualitatively inferior with respect to local residence, civic participation, and broadcast experience. First, as to local residence we must weigh Jarad's 100% credit for current long-term service area residence (since 1977) against WINK's 50% credit for past but longer duration service area residence (1948-1973). We find that the greater duration of WINK's residence credit is offset by its termination in 1973, and that Jarad's credit is decidedly superior because of the 100% vs. 50% quantitative disparity. *See Debra D. Carrigan*, 60 RR 2d 1045, 1050 (1986). While we also recognize that WINK has an additional 50% credit for past short-term residence (1969-1973), that credit is of less significance because it is short in duration and not current. *See id.; Northern Sun Corp.*, 100 FCC 2d 889, 893-894 (Rev. Bd. 1985), *recon. denied*, 100 FCC 2d 1440, *rev. denied*, FCC 86-135, released March 28, 1986. Second, Jarad is also significantly ahead on civic participation because its 100% credit is both larger than WINK's and is for

current civic participation whereas WINK's 50% credit represents civic activities within the service area which apparently ceased with Mrs. Graiff's move from the service area in 1973. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109-1110 (Rev. Bd. 1984), *aff'd*, 100 FCC 2d 941, 947 n. 16 (1985); *Northern Sun, supra*, 100 FCC 2d at 892-893. Finally, Jarad's 100% credit for long-term broadcast experience significantly exceeds WINK's 50% credit.

49. Thus, Jarad is significantly ahead of WINK in each of these three qualitative enhancement categories. Even if the 50% female ownership enhancement credit awarded WINK by the ALJ were considered, *see* paras. 25, 45 and para. 7, *supra*, that credit would still be solidly outweighed by Jarad's significant advantages. *See Reginald A. Fessenden Educational Fund, Inc., supra*, 100 FCC 2d at 454-455. Therefore, we award Jarad a slight overall integration preference over WINK, *see Radio Jonesboro, supra*, 96 FCC 2d at 1112, which in turn outweighs WINK's slight comparative coverage preference, *see Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 656 (Rev. Bd. 1983) (integration factor is normally more important than comparative coverage) (subsequent history omitted) and therefore places Jarad ahead of WINK in the overall comparative analysis. *See also Barton Broadcasting, supra*, 60 RR 2d at 326-327 (winner preferred in three integration enhancement factors whereas loser preferred in only coverage to well-served areas); *Northern Sun, supra*, 100 FCC 2d at 894-895.

50. *Fonic*. The ALJ credited Fonic with 76% full-time integration for the proposed station management participation of owners Christina Mamos (52% partner) and Teddy Savalas (24% partner) as general manager and station manager, respectively. Because a third partner, Telly Savalas (24%), is not proposed to be integrated into station management, no corresponding credit was awarded. *I.D.*, paras. 109, 111, 115, 119, 190. Fonic has filed a makeweight exception seeking an additional 24% integration credit based on the beneficial effect on station performance it speculates will result from Telly Savalas' ownership association with the station. Fonic Br. at 4-9. It does not, however, except to the ALJ's findings that Telly Savalas will not be integrated into station management. Accordingly, we deny its exception as contrary to long-established Commission policy. *See Policy Statement, supra*, 1 FCC 2d at 395-396; *e.g., Georgia Mountain Corp.*, 57 RR 2d 1020, 1024 (Rev. Bd. 1985), *rev. denied*, FCC 85-559, released October 18, 1985. With only 76% full-time credit, Fonic is decisionally behind Jarad which has been credited with 100% integration. *See Vacationland Broadcasting Corp.*, 97 FCC 2d 485, 495 (Rev. Bd. 1984) (subsequent history omitted).

51. *McComas*. The ALJ assessed a very slight diversification demerit against McComas because its sole stockholder, James P. Miro, has an 8% interest in an AM broadcast station at San Juan, Puerto Rico. *I.D.*, paras. 159, 161, 200. McComas also received 100% full-time integration credit for Mr. Miro's proposed role as general manager of the station. *Id.*, paras. 162, 201, 205. In its exceptions, McComas urges that the San Juan station should be regarded as a *de minimis* interest and, therefore, it should not receive any diversification demerit. We disagree. The Commission considers media interests in distant radio stations as relevant to the diversification factor, *CJL Broadcasting, Inc.*, 95 FCC 2d 544, 549 (1983); *Joseph Bahr*, 92 FCC 2d 114 (Rev. Bd. 1982), and, after considering McComas' argument that San Juan is well served by other media and that the proposed station is an FM station whereas the extant San Juan station is an AM station, we conclude that the ALJ's assessment of a very slight demerit against McComas was reasonable.

52. More significantly, Westplex has pointed out in its exceptions (Br. at 43) that McComas filed on January 9, 1986 a post-hearing statement that Mr. Miro "is in Puerto Rico, preparing to enter into active service with the Marine Corps for a six-year term of duty." At oral argument, McComas' counsel conceded that Mr. Miro was commissioned as a Marine Corps officer on December 12, 1985 and will be on active duty for at least 3 years, and more probably 6 years. Tr. of Oral Argument at 3642. Because it therefore appears that Mr. Miro will not be available to fulfill his managerial commitment to the proposed station for quite some time, we must withhold awarding McComas any integration credit whatsoever. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1614-1615 (Rev. Bd. 1985), and cases cited therein; *cf. Houston Family TV, supra*, 101 FCC 2d at 668 ("reasonable assurance" is required before integration proposal can be credited). Accordingly, McComas finishes very low in the comparative analysis, and its remaining exceptions are non-decisional.

53. *Comparative Summary*. After considering all decisionally significant exceptions, we have found that Jarad, with 100% quantitative integration credit enhanced by 100% qualitative credits for local residence, civic participation, and broadcast experience, is comparatively the best applicant in this proceeding. Close behind with essentially equal quantitative credit, but lesser qualitative enhancements, are WINK, which also has a less important edge for greater coverage of well-served areas, and GCB. NSB, which also trails Jarad on qualitative integration, received a very slight diversification demerit. The remaining applicants finished much further down in the pack. We therefore conclude that a grant of the Jarad application will best serve the public interest, convenience, and necessity.[13]

54. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed on May 14 and June 27, 1986 by Garden City Broadcasting, Inc. and Westplex Broadcasting Company, respectively, ARE GRANTED, and the amendments ARE ACCEPTED;[14]

55. IT IS FURTHER ORDERED, That the contingent motions to reopen the record and enlarge issues filed on June 26 and 27, 1986 by Jarad Broadcasting Company, Inc. ARE DISMISSED;[15]

56. IT IS FURTHER ORDERED, That the motions to strike filed May 20 and July 30, 1986 by Westplex Broadcasting Company and Jarad Broadcasting Company, Inc., respectively, ARE DENIED; and

57. IT IS FURTHER ORDERED, That the application of Jarad Broadcasting Company, Inc. (File No. BPH-830325AC) for authority to construct and operate a new FM broadcast station at Garden City, New York IS GRANTED, the application of Mid-Island Broadcasting, Inc. (File No. BPH-830714AK) IS DISMISSED, and the applications of Spectron Broadcasting Corporation (File No. BPH-830516AK), Garden City Broadcasting, Inc. (File No. BPH-830713AQ), Westplex Broadcasting Company (File No. BPH-830714AE), North Shore Broadcasting (File No. BPH-830714AF), December Ventures, Inc. (File No. BPH-830714AG), WINK Radio, Inc. (File No. BPH-830714AH), Fonic Broadcasting Co. (File No. BPH-830714AI), and McComas Broadcasting Corporation (File No. BPH-830714BF) ARE DENIED.

Eric T. Esbensen
Member, Review Board
Federal Communications Commission

FOOTNOTES

[1] Previously, the Commission denied the application for renewal of the WLIR(FM) license, filed by Stereo Broadcasters, Inc., because that licensee had "unlawfully transferred control of [the] station...without Commission authorization, made misrepresentations, and lacked candor about the incident. Stereo ha[d] also committed serious misrepresentations in connection with violations of [the Commission's] technical rules, some of the violations being willful." *Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 117 (1981), *recon. denied*, 50 RR 2d 1346 (1982). Since January 10, 1983, and pursuant to a Commission grant of Special Temporary Authority, Phoenix Media Corp. has broadcast from the WLIR(FM) facilities. *Phoenix Media Corp.*, FCC 86-268, released May 28, 1986, at para. 2. Although, following a comparative hearing, Long Island Radio Communications, Inc. had been granted interim authority to operate the WLIR(FM) facilities, *Phoenix Media Corp.*, 56 RR 2d 1241 (Rev. Bd. 1984), *review denied*, FCC 85-435, released August 6, 1985, the Commission has since stayed that grant and has authorized Phoenix Media to continue operation pending further action by the Commission. FCC 86-268, *supra*.

[2] Three other applications, those of Women's Long Island Radio, Inc., Mid-Island Broadcasting, Inc., and Hempstead Broadcasting Corporation, were originally designated in the *HDO*. The *Initial Decision* denied the Mid-Island Broadcasting application, and the applicant has not filed any exceptions; accordingly, we will dismiss that application for failure to prosecute. *See* 47 CFR 1.276(f). The other two applications were dismissed by the presiding officer for failure to prosecute. *See Initial Decision* at note 1.

[3] Exceptions have also been levied against the weight of Jarad's qualitative enhancement credits as they compare to those of the various other applicants. The ALJ properly credited Jarad with 100% credit for Mr. Morey's service area residence since 1977; for his limited civic participation as fundraising chairman for an area private school which his son attends and as a dues-paying member and yearly meeting attendant of the Brookville Taxpayers Association; and for his broadcast experience as a station announcer (1965-1974) and assistant director of programming (1971-1972) and broadcast-related experience as a free-lance "voice over" announcer (since 1975). *I.D.*, paras. 15-17, 168, 205; Jarad Exh. 1. These qualitative enhancement factors need be weighed in our comparative summation, *infra*, against only those applicants, if any, for whom there is no "clear quantitative difference" between their quantitative integration credits and Jarad's 100% full-time credit. *See, e.g., Vacationland Broadcasting Co., Inc. (WFTW-FM)*, 97 FCC 2d 485, 495 (Rev. Bd. 1984) (subsequent history omitted).

[4] This result makes it unnecessary to consider whether the ALJ erred procedurally in excluding proffered rebuttal evidence by the other applicants intended to discredit Mr. Morey's claim.

[5] Spectron did not formally amend its certificate of incorporation to permit the issuance of non-voting stock until January 10, 1985.

[6] Further details concerning the involvement of Mr. Galesi in the application will be discussed *infra* at paras. 19-20.

[7] We also note, although the parties have not argued this point, that Spectron's by-laws may be ambiguous as to the powers of voting versus non-voting shareholders. On the one hand, with regard to the power to elect a board of directors, the by-laws provide:

> Art. III, Sec. 1(b): *Except as may otherwise be provided herein* or in the Certificate of Incorporation, the members of the Board of Directors of the Corporation, who need not be shareholders, shall be elected by a majority of the votes cast at a meeting of the shareholders, *by the holders of shares entitled to vote in the election.*

Jared Ex. 7 at 4 (emphasis added). However, the by-laws section delineating voting rights at shareholders meetings provides to the contrary that:

> Art. I, Sec. 6(a): Except as provided by statute or by the Certificate of Incorporation, any corporate action, *other than the election of directors to be taken by vote of the shareholders*, shall be authorized by a majority of votes cast ... by the holders of shares entitled to vote therein.

Id. at 3 (emphasis added). If the "non-voting" shareholders do vote in board of directors elections, then we wonder what significant actions remain that would require the exclusive "vote" of the sole "voting" shareholder in a close corporation such as Spectron.

[8] This date was July 16, 1984, well before the date when all the Westplex partners signed the partnership agreement.

[9] This result obviates the need to reach exceptors' other contentions that Westplex has engaged in an unauthorized transfer of control or that its general partners cannot effectuate their proposals. We affirm, however, the ALJ's assessment of a very slight diversification demerit against it. We also note that denial of integration credit to Westplex could also be premised on that applicant's inadequate showing that its proposed limited partners were sufficiently insulated from management. Specifically, it appears from the record that the limited partners have been active throughout the application process in selecting communications counsel, attending and participating in meetings, selecting the partnership form, and putting the group together. It also appears that the general partners did not meet together before the B cut-off date or ever in the absence of the limited partners. Thus, even had Westplex developed a timely written limited partnership understanding, the questionable *bona fides* of that agreement would have resulted in decisionally diminished integration credit.

[10] The magnitude of this preference would be unaffected by any consideration of NSB's belated claim that its three partners would move to Garden City if the application were granted, see NSB Br. at 13, because proposed future local residence is insignificant in comparison to long-term service area residence. *Talleyrand Broadcasting, supra*, 103 FCC 2d at 480.

[11] We also deny DVI's exception to the slight diversification demerit assessed against it by the ALJ. See DVI Br. at 14-22. It is undisputed that DVI's sole stockholder, Mr. Lewis, owns 51% of Uniworld, which places advertising on broadcast stations that cover portions of DVI's proposed service area. Though advertising firms *per se* are not media of mass communications, placement of advertisement on stations serving the area is relevant to the Commission's diversification objectives. *Berryville Broadcasting, supra*, 70 FCC 2d at 15. While the size of DVI's demerit could conceivably be reduced to "very slight," we need not dwell on this matter in light of our above analysis of the integration factor, which is the decisive comparative element in this case.

[12] In view of our ultimate conclusion herein, *see* para. 49, *infra*; we need not reach Westplex's exception (Br. at 4-16) that the ALJ erred in adopting WINK's engineering exhibit rather than the competing applicants' joint engineering exhibit which shows WINK's population advantage to be only about 38,000 people.

[13] We agree with and adopt the ALJ's resolution of the main studio issue in favor of Spectron, *I.D.*, paras. 4-8, 165-166. We need not address further the exceptions to this issue because of our ultimate conclusion herein. Also, we shall dismiss as moot

Jarad's contingent motions to reopen the record and enlarge issues against Spectron and Westplex. Finally, we did not discuss auxiliary power, which was proposed by each applicant, *id.*, para. 203, because we regard them as equal on this factor, *cf. Big Bend Broadcasters*, 96 FCC 2d 166, 172 (Rev. Bd. 1983), *rev. denied*, FCC 84-645, released December 26, 1984; and, in any event, this factor is entitled to only minor weight. *Id.*

[14] On May 7, 1986, Jarad filed comments on a petition for leave to amend allegedly filed by Spectron "on or about April 28, 1986." However, our search of Commission files reveals no such filing. Accordingly, we have no Spectron petition for leave to amend before us upon which to rule.

[15] A comment on Jarad's June 27, 1986, Contingent Motion to Re-open and Enlarge is appropriate. In light of our decision herein, it is not necessary to reach the merits of Jarad's allegations raised in its Motion. However, we note that Jarad has supplied copies of a "newspaper" article from the June 1986 issue of *The Women's Record*, as well as a press release dated April 28, 1986 on Spectron letterhead. The news article depicts Spectron's President, and former FCC attorney, Angela Shaw, sitting in front of broadcast studio equipment and describes her as "own[ing] and operat[ing] WLIR-FM, 92.7." The text of the article describes her as "general manager of L.I. radio station WLIR-FM." The press release, which was obviously prepared by Spectron, invites the public to attend a "gala celebration" to commemorate the award of "a permanent construction permit" to Spectron for "WLIR, 92.7 FM." Without passing on the merits of Jarad's unopposed allegations, we do note that such conduct is at the very least inappropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-389

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Honeoye Falls, New York)	RM-5353

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making submitted by Monroe-Livingston Radio Ltd. ("petitioner") requesting the allocation of FM Channel 297A to Honeoye Falls. New York, as the community's first local service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 297A can be allocated to Honeoye Falls in compliance with the Commission's minimum distance separation and other technical requirements if the transmitter site is restricted to an area at least 1.3 kilometers (0.8 miles) northeast to avoid a short-spacing to Station WUWU, Channel 299, Wethersfield, New York.

3. We believe the public interest would be served by proposing the channel allocation since it could provide the community with its first local FM service. Accordingly, we propose to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. with respect to the community listed below, to read as follows:

	Channel No.	
Present		Proposed
Honeoye Falls, New York	—	297A

4. The Commission's authority to institute rule making proceedings. showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5 Interested parties may file comments on or before December 15, 1986 1986 and reply comments on or before December 30, 1986. and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Robert C. Savage, Esq.
70 Main Street
Scottsville, New York 14546
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Alloments, Section 73 202(b) of the Commission's Rules See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b). 73. 504 and 73. 606(b) of the Commission's* R u l e s , *48 Fed. Reg. 11549, published February 9. 1981.*

7. For further information concerning this proceeding. contact Leslie K. Shapiro, Mass Media Bureau. (202) 634.6530. However. members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings. such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making. other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-390

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Northwood, Iowa)	RM-5419

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Northwood Broadcasting Co., Inc. ("petitioner") seeking the allotment of FM Channel 284A to Northwood, Iowa, as that community's first local broadcast service. Petitioner indicates that he will apply for the channel, if allotted.

2. A staff engineering study has determined that Channel 284A at Northwood, Iowa, would be short spaced to a pending rule making for Channel 283C2 at Blue Earth, Minnesota (RM-5557). The study indicates that as an alternative, Channel 274A can be allotted to Northwood and meet all the spacing requirements of Section 73.207 of the Rules. In view of our proposed action herein, petitioner should advise in its comments whether it will apply for Channel 274A, if allotted.

3. Since the proposed allotment could provide a first local broadcast service to Northwood, Iowa, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

	Channel No.	
City	Present	Proposed
Northwood, Iowa		274A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 15, 1986 and reply comments on or before December 30, 1986 and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Marlin Hanson, President
Northwood Broadcasting Co., Inc.
308 - IIth, North
Northwood, Iowa 50459
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606*(b) *of* the *Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-374

In the Matter of
Amendment of Section 73.202(b), RM-5470
Table of Allotments,
FM Broadcast Stations.
(Cashmere, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1986 Released: October 16, 1986

By the Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Robin P. Calhoun ("petitioner") seeking the allotment of Channel 258A to Cashmere, Washington, as that community's first FM service. Petitioner has stated her intention to apply for the new channel, if allotted.

2. The allotment can be made in compliance with the Commission's minimum distance separation requirements. Since Cashmere is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence by the Canadian government must be obtained before the channel can be allotted.

3. Accordingly, in order to provide a first FM service to Cashmere, Washington, the Commission proposes to amend the FM Table of Allotments, section 73.202(b) of the Rules, with regard to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Cashmere, Washington	—	258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 8, 1986, and reply comments on or before December 23 ,1986, and are advised to read the Appendix for the proper Procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant. as follows:

Robin P. Calhoun
3030 W. 4th Avenue #C-39
Kennewick, WA 99336
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603and 604of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b),73. 504and 73. 606(b)of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau. (202) 634-6530. However. members of the Public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request. 3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W. Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-375

In the Matter of

Amendment of Section 73.202(b), RM-5511
Table of Allotments,
FM Broadcast Stations.
(Hyannis, Massachusetts)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1986 Released: October 16, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Radio Hyannis, Inc. ("petitioner"), requesting the substitution of FM Channel 275A for 276A at Hyannis, Massachusetts. Petitioner also requests that we permit its application for Channel 275A to be amended to specify FM Channel 276A and to retain cutoff protection.

2. Channel 276A was allocated to Hyannis, Massachusetts, in 1983 (Docket 83-94). Although nine applications were originally set for hearing (49 FR 44239, November 5, 1984), only four applicants remained at the time the petition was filed.[1] On July 1, 1986, the four applicants filed a "Joint Request for Approval of Settlement Agreement," which contemplated the grant of the Radio Hyannis application and the dismissal of the other three applications. The Commission adopted an *Order* on July 7, 1986, approving the settlement and granting the Radio Hyannis application.

3. Radio Hyannis originally proposed to locate its FM antenna for Channel 275A on the existing WOCB-WJFK(FM) tower in West Yarmouth, Massachusetts. Petitioner states that following Hurricane Gloria, an engineering consultant examined the tower and concluded that it would not be strong enough to support another antenna at the heights proposed by Radio Hyannis. Petitioner further states that by adopting the proposed channel substitution, the Commission will provide a greater area in which the transmitter site can be located. In particular, the substitution will make it possible to specify the WCVX-TV tower in Barnstable, Massachusetts, as an antenna site.

4. In accordance with Commission policy, we would retain Radio Hyannis, Inc.'s cutoff protection when it amends to specify Channel 275A, since the channels are equivalent. See, *Phillipsburg ,Kansas* (Docket 82-145), 48 FR 10844, March 15, 1983.

5. In view of the foregoing, the Commission proposes to amend the FM Table of Allotments,Section 73.202 (b) of the Commission's Rules, as follows:

Community	Channel No. Present	Proposed
Hyannis, Massachusetts	276A, 291B	275A, 291B

6. The Commission's authority to institute rule making proceedings, showings required, cutoff procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

7. Interested parties may file comments on or before December 8, 1986, and reply comments on or before December 23 , 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard Hildreth
Vincent J. Curtis, Jr.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoke or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Puopolo Communications, Inc. (BPH 830902AA), Radio Hyannis, Inc. (BPH 840104AE), L&D Broadcasting, Inc. (BPH 840105AE), and Hyannis and Cape Cod Broadcasting Company, Inc. (BPH 840105AZ).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-376

In the Matter of

Amendment of Section 73.202(b), RM-5367
Table of Allotments,
FM Broadcast Stations.
(Meridianville, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopt: September 24, 1986 Released: October 16, 1986

By the Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Gant Broadcasting, Inc. ("petitioner"), seeking the allocation of FM Channel 231A to Meridianville, Alabama, as that community's first local broad-cast service. Petitioner states its intent to apply for the channel, if allotted.

2. A staff engineering study reveals that Channel 231A can be allotted to Meridianville in conformity with the minimum spacing requirements of Section 73.207 of the Commission's Rules provided the transmitter is located in an area at least 4.9 kilometers (3.1 miles) north of the community to avoid short-spacing to the 16 kilometer protected buffer zone of Station WQXI-FM (Channel 231), Smyrna, Tennessee. In addition, the proposal is conditioned on the grant of a construction permit to Station WAQT(FM) (Channel 231), Carrollton, Alabama (File No. BPH850712JA), to relocate its transmitter and increase antenna height to maintain its Class C status. Therefore, should the channel be allotted as proposed, we would not open a filing window until the Carrollton station is issued a license for the site change.

3. In view of the above, since the proposed allotment could provide a first local broadcast service to Meridianville, Alabama, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include that community, as follows:

	Channel No.	
City	Present	Proposed
Meridianville, Alabama	—	231A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 8. 1986 and reply comments on or before December 23 ,1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

R. Parker Griffith, President
Gant Broadcasting Inc.
115 Manning Drive, Suite D
Huntsville, Alabama 35801

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Nancy V. Joyner or Stanley Schmulewitz, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-377

In the Matter of

Amendment of Section 73.202(b), RM-5409
Table of Allotments,
FM Broadcast Stations.
(Manteo, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1986 Released: October 16, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by Orbit Communications, Inc., d/b/a Women in Technical Communications ("petitioner"), requesting the substitution of Channel 256C2 for Channel 257A at Manteo, North Carolina, and modification of its permit for Station WVOD(FM) to specify operation on the higher powered channel. Petitioner states that the substitution of channels would permit it to expand its local service to reach all of Dare County.

2. Channel 256C2 can be allocated to Manteo in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. In accordance with Commission policy, we shall also propose to modify the permit of Station WVOD(FM) to specify operation on the higher powered channel. Pursuant to §1.420(g) of the Commission's Rules, we shall not accept the filing of other expressions of interest in the proposed adjacent channel upgrade at Manteo. See Report and Order, MM Docket No. 85-313, 51 FR 20290, published June 4, 1986.

3. We believe that petitioner's proposal warrants further consideration as it could provide Manteo and its environs with expanded radio coverage. Accordingly, the Commission proposes to amend the FM Table of Allotments, §73.202(b) of the Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Manteo, North Carolina	252A, 257A	252A, 256C2

4. The Commission's authority to institute rule making Proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 8, 1986 and reply comments on or before December 23, 1986, and are advised to read the Appendix for the proper Procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Helen E. Disenhaus, Esq.
Dow, Lohnes & Albertson
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule* Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involved channel allotments. An ex parte contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a). (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-379

In the Matter of

Amendment of Section 73.202(b), RM-5429
Table of Allotments,
FM Broadcast Stations.
(Frankfort, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1986 Released: October 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Allan Communications, Incorporated ("petitioner")[1] requesting the allotment of FM Channel 279A to Frankfort, Kentucky, as that community's second local FM service. Petitioner indicates that he will apply for the channel, if allocated.

2. A staff engineering study reveals that Channel 279A can be allocated to Frankfort in compliance with the minimum distance separation requirements with a site restriction 3.1 kilometers (1.9 miles) northwest to avoid IF interference (54 channels removed) to Station WVLK-FM, Channel 225C, Lexington, Kentucky.

3. Since the proposed allotment could provide a second local FM broadcast service to Frankfort, Kentucky, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for that community as follows:

City	Present	Proposed
Frankfort, Kentucky	285A	279A, 285A

4. The authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 8, 1986, and reply comments on or before December 23, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Nancy L. Wolf
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
(Counsel to Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 7 3.504 and 73.606 (b) of the Commission's Rules*, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is the licensee of daytime-only AM Station WKED, Frankfort, Kentucky.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-380

In the Matter of

Amendment of Section 73.202(b), RM-5433
Table of Allotments,
FM Broadcast Stations.
(Los Lunas, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1986 Released: October 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by Brasher Broadcasting Co. ("petitioner") requesting the substitution of Channel 273C2 for Channel 272A at Los Lunas, New Mexico, and the modification of its permit for Station KBBU to specify operation on the higher powered channel. Petitioner states that the upgraded facilities would provide a new fulltime broadcast service to a substantial population in a wide area.

2. Channel 273C2 can be allocated to Los Lunas in compliance with the Commission's minimum distance separation requirements and used at station KBBU's present site. In accordance with Commission policy, we shall also propose to modify the permit of Station KBBU to specify operation on the higher powered channel. Pursuant to the Commission's rules, modification of the license of Station KBBU may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties. See *Report and Order,* MM Docket No. 85-313, 51 FR 20290, June 4, 1986.

3. We believe the public interest would be served by proposing the channel substitution since it could provide expanded service to the community and its environs. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below to read as follows:

Channel No.

City	Present	Proposed
Los Lunas, New Mexico	272A, 292A	273C2, 292A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 8, 1986 and reply comments on or before December 23 ,1986, and are advised to read the Appendix for the proper Procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Eugene L. Burke, Esq.
Burke s Burke
Box 439
Falls Church, Virginia 22046
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504* and *73.606 (b) of the Commission's Rule,* 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the Public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-381

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Folsom, Louisiana) — RM-5352

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1986 Released: October 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Folsom Community Broadcasters ("petitioner") requesting the allotment of FM Channel 285A to Folsom, Louisiana, as that community's first FM channel. Petitioner has expressed an intention to apply for the channel, if allotted.

2. The channel can be allocated in compliance with the Commission's minimum distance separation requirements with a site restriction 10.1 kilometers (6.3 miles) east of Folsom. The site restriction is necessary to avoid short spacing to Station KSMI-FM, Channel 285A, Donaldson, Louisiana, and Station WZZB(FM), Channel 285A, Centreville, Mississippi.

3. In view of the fact that the proposed allotment could provide a first FM allotment to Folsom, Louisiana, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules for the following community:

	Channel No.	
City	Present	Proposed
Folsom, Louisiana	—	285A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

5. Interested parties may file comments on or before December 8, 1986, and reply comments on or before December 23, 1986, and are advised to read the Appendix for the proper Procedures. Additionally. a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Charles L. Spencer, Esq.
Herbert and Spencer
701 Laurel Street
Baton Rouge, LA 70802
(Counsel to Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's rules.* 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-382

In the Matter of

Amendment of Section 73.202(b), RM-5467
Table of Allotments,
FM Broadcast Stations.
(Merkel, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1986 Released: October 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Fox Communications, Inc. ("petitioner"), licensee of Station KFQX-FM, Channel 272A, Merkel, Texas, requesting the substitution of Channel 274C1 for Channel 272A at Merkel and modification of its license to specify operation on Channel 274C1. Petitioner submitted information in support of the proposal and states the substitution will provide a better utilization of spectrum space and maximize local FM broadcast service in Merkel.

2. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.0 kilometers (10.6 miles) southeast of Merkel in order to avoid short spacing to current license site for Station KZII-FM, Channel 273, Lubbock, Texas. 1/ Since the petitioner's proposed site is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence must be obtained from the Mexican government before the channel can be substituted.

3. In accordance with our established policy, we shall propose to modify the license of Station KFQX-FM to specify operation on Channel 274Cl. Pursuant to Section 1.420(g), we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel. See *Modification of FM Broadcast Licenses to Hiqher Class Co - channel or Adjacent Channels*, 51 FR 20290, June 4, 1986.

4. Accordingly, in order to provide Merkel with its first wide coverage FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Merkel, Texas	272A	274C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before December 8, 1986, and reply comments on or before December 23, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John B. Kenkel, Esquire
Kenkel, Barnard & Edmundson
1220 - 19th Street, N.W. - #202
Washington, D.C. 20037

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia A. Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Station KZII-FM has a construction permit (BPH8050620IM) outstanding to relocate its transmitter and become a Class C1 station. Should a license be issued for this facility, no site restriction would be necessary. The petitioner's proposed site would comply with the spacing requirements only if the Lubbock station received a license at its new site.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-395

In re Applications of

TERESA BROWN File No. BPH-841218MB
(hereafter Brown)
Barling, Arkansas
Req: 94.5 MHz, Channel 233A
3 kW (H & V), 59 meters

MARTHA L. DEMAREE File No. BPH-850520MC
(hereafter Demaree)
Barling, Arkansas
Req: 94.5 MHz, Channel 233A
3 kW (H & V), 100 meters

BETSY KEITH PILGRIM File No. BPH-850531ML
(hereafter Pilgrim)
Barling, Arkansas
Req: 94.5 MHz, Channel 233A
3 kW (H & V), 71 meters

AGUILAR BROADCASTING COMPANY File No. BPH-850531NZ
(hereafter Aguilar)
Barling, Arkansas
Req: 94.5 MHz, Channel 233A
3 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 6, 1986 **Released: October 20, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:

APPLICANT(S) WAIVER JUSTIFICATION(S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT(S) DEFICIENCY

Applicable [ ] **Inapplicable** [X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.

APPLICANT(S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cutoff date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT(S) DATE AMENDMENT(S) FILED

Pilgrim 7/2/86

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):
Demaree
Aguilar

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Demaree, Aguilar

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Pilgrim

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this preceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W. Washington, DC 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX(ES)

[ ] IS [X] IS NOT ATTACHED

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-260

Amendment of Section 73.202(b), RM-4955
Table of Allotments,
FM Broadcast Stations.
(Eldon, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 3, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the Notice of Proposed Rule Making, 50 FR 35579, September 3, 1985, in response to a petition filed by Roy D. Williford ("petitioner"). The Notice proposed the allotment of FM Channel 270A to Eldon, Missouri, as that community's second FM service. Petitioner filed comments in support of the Notice and stated his intention to apply for the channel. Columbia FM, Inc., licensee of Class A FM Station KARO, Columbia, Missouri, filed a pleading entitled "Comments on and Counterproposals to Proposed Rule Making and Request for Consolidation." That pleading opposed this proposal, addressed its own petition then pending in a separate proceeding for new Class C2 channels for Columbia, Missouri, and contained a counterproposal to this docket. Petitioner filed reply comments.

2. In a separate petition for rule making, Columbia FM, Inc. had proposed to upgrade Station KARO(FM), Channel 269A to Channel 290C2, and offered FM Channel 270C2 as an equivalent channel for other interests in accordance with Sec.1.420(g) of the Commission's Rules.[1] In order to allocate Channel 270C2 to Columbia, a waiver of Sec.73.207(b) of the Rules would be required with regard to noncommercial educational FM Station KBIA, currently operating on Channel 217 in Columbia. Columbia and Eldon, Missouri, are approximately 72 kilometers apart and due to the required 163 kilometer co-channel minimum distance separation between Class A and Class C2 facilities, the proposal to allot Channel 270A to Eldon would preclude allotment of Channel 270C2 in Columbia, Missouri. Columbia FM proposed, as an alternative, the allotment of Channel 250A or 252A to Eldon in place of 270A. However, those channels are available to Eldon only if Channel 252A at Columbia were deleted and replaced by another channel.[2]

3. In reply comments, petitioner opposes the counterproposal filed by Columbia FM. Petitioner states that Channel 270A can be allocated to Eldon without the need for a site restriction, waiver of the Commission's short spacing rules, or reorganization of allocations in other communities. Allotment of Channel 270A to Eldon could provide a second local broadcast service. Petitioner argues that Columbia presently has nine radio stations and is served by three television stations. Eldon, on the other hand, currently has one radio station. In addition, Columbia is served by a daily newspaper while Eldon enjoys only a local weekly paper. Petitioner also argues that the Commission and the courts have traditionally held that providing service to persons or communities who presently enjoy little or no broadcast service is one of the Commission's basic missions, and that the allocation of Channel 270A to Eldon would best serve the public interest by providing a new service to the community. Further, petitioner asserts that the allocation at Eldon would avoid a substantial restructuring of the FM Table of Allotments in:central Missouri, and avoid the need for a waiver of the Commission's minimum mileage separation requirements. Petitioner also states that Columbia FM, Inc.'s counterproposal and petition would require numerous channel substitutions and a waiver of Sec. 73.207(b) of the Rules.

4. In view of the fact that Columbia FM's proposal has been returned as unacceptable and we have found no public interest reason to delay this proposal, we shall proceed to consider the request to allot Channel 270A to Eldon, Missouri.[3] This channel can be allotted in compliance with the minimum distan e separation requirements of Sec.73.207 of the Commissions Rules. Thus, we believe it would be be in the public interest to allocate Channel 270A as a second FM channel to Eldon. However, as indicated in footnote 3, this allotment is conditioned on he outcome the outcome of the pending petition for reconsideration of Columbia FM.

5. Accordingly, pursuant to the authority contained in Sec.4(i) 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sec.61, 204(b) and 0.239 of the Commission's Rules, IT IS ORDERED, That effective December 1, 1986 the FM Table of Allotments, Sec. 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below:

Community	Channel No.
Eldon, Missouri	224A, 270A

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. The window period for filing applications on both channels will open on December 2, 1986, and close on December 31, 1986.

8. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The petition filed by Columbia FM was returned, by letter, as unacceptable on May 12, 1986.

[2] Contemporary Broadcasting Inc., licensee of Station KFMZ(FM), filed a petition for rule making on August 27, 1985, to substitute Channel 250C2 at Columbia, and to modify its license for Channel 252A to reflect the higher class of channel. This petition was found to be unacceptable and was returned by letter on May 12, 1986.

[3] Since Columbia FM has failed to provide sufficient reason to delay service to Eldon, we have decided to deny the request to hold this proceeding in abeyance. We note that Columbia FM has

filed a petition for reconsideration of the dismissal of its petition. That pleading does not request a stay of the Eldon proposal here, but does request that any action in this proceeding be held in abeyance until final resolution of the petition for reconsideration. On June 18, 1986, Roy D. Williford, petitioner for the channel at Eldon, responded to Columbia FM's petition for reconsideration restating his support for the Eldon channel and requesting the Commission to expeditiously allocate Channel 270A to the community. Columbia FM, Inc., on June 30, 1986, filed a reply to the opposition. Columbia FM again urged the Commission to hold in abeyance the Eldon proposal pending final resolution of their request for reconsideration. Rather than further delay the Eldon request, we shall condition the allotment herein until final action of Columbia FM's request is taken.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No 85-379

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Franklin, Virginia) — RM-5091

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*. 50 FR 51560, December 18, 1985, proposing the allotment of Channel 269A to Franklin, Virginia, as that community's first FM service. The *Notice* was issued in response to a petition filed by Franklin Broadcasting Corporation ("petitioner"), licensee of Station WYSR(FM), Franklin, Virginia. Petitioner filed supporting comments reaffirming its interest to apply for the Channel.

2. We believe the public interest would be served by the allotment of Channel 269A to Franklin, Virginia, in order to provide a first FM service to that community. The channel can be allotted in compliance with the Commission's minimum distance separation requirements, with a site restriction of 6.6 kilometers (4.1 miles) west of the community. This restriction is necessary to avoid a short spacing to Station WWDE-FM, Channel 267, Hampton, Virginia. Also the allotment to Franklin is conditioned on Station WAZZ(FM), Channel 270, New Bern, North Carolina receiving a license at the new site for which an application is pending (BMPH860428IK) reclassifying the station as a Class C1 facility. Therefore, the filing window dates for Channel 269A at Franklin, Virginia will be announced at a future date to follow the licensing of the New Bern station.

3. Accordingly, pursuant to the authority contained in Sec.4(i) 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs. 0.61, 0.204(b) and 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 1, 1986 the FM Table of Allotments IS AMENDED with regard to the following community:

City	Channel No.
Franklin, Virginia	269A

4. The window period for filing applications will be announced at a later date.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-17

Amendment of Sec.73.202(b), RM-4973
Table of Allotments,
FM Broadcast Stations.
(Kings Beach, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission herein considers the Notice of Proposed Rule Making, 51 FR4191, February 3, 1986, issued in response to a petition filed by Eric R. Hilding ("petitioner") proposing the allotment of Channel 299A to Kings Beach, California, as that community's first local FM broadcast service. Supporting comments were filed by petitioner in which he reiterated his intention to apply for the channel. No oppositions to the proposal were received.

2. We believe the public interest would be served by allotting Channel 299A to Kings Beach, California, since it could provide a first local FM service to the community.

3. As indicated in the *Notice* , Channel 299A can be allotted to Kings Beach in conformity with the minimum distance separation requirements of Sec.207(b) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sec.4(i), 5(c)(1), 303(g)and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs.0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That, effective December 1, 1986, the FM Table of Allotments, Sec.73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Kings Beach, California	299A

5. The window period for filing applications on Channel 299A at Kings Beach, California, will open December 2, 1986, and close December 31, 1986,

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-26

Amendment of Sec.73.202(b), Table of Allotments, FM Broadcast Stations. (Fresno, California) — RM-5113

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission herein considers the Notice of Proposed Rule making, 51 FR 4515, February 5, 1986, proposing the allotment of Channel 257A to Fresno, California, as that Community's eighth commercial FM service, in response to a petition filed by New Life Enterprises, Inc. Supporting comments were filed by petitioner reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 257A to Fresno, California, since it could provide an eighth local FM broadcast service. Channel 257A can be allotted to Fresno in conformity with the minimum spacing requirements of Sec.73.207(b) of the Commission 73.207(b) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sec.4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 1, 1986, the FM Table of Allotments, Sec.73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fresno, California	229, 239, 250, 257A, 266, 270, 274, 290

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 257A at Fresno, California,will open on December 2, 1986, and close on December 31, 1986.

6. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-158

Amendment of
Section 73.202(b), RM-5245
Table of Allotments,
FM Broadcast Stations.
(Boonville, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making* , 51 FR 18809, May 22, 1986, proposing the substitution of FM Channel 267A for Channel 268A at Boonville, New York, at the request of Oswego-Jefferson Broadcasting Corporation ("petitioner"). Comments supporting the substitution were filed by Wheat Hill Broadcasters, Inc. ("Wheat Hill"), proposed assignee of Stations WSCP(AM) and WSCP-FM, Pulaski, New York, licensed to the petitioner, and by The AtWood Broadcasting Corporatioh ("Atwood"), an applicant for Channel 268A at Boonville (ARN-851204MB).

2. Wheat-Hill supports the substitution of channels, stating that it would permit Station WSCP-FM to provide improved radio service to Pulaski. It also affirms petitioner's statement that it will promptly construct Station WSCP-FM at the new site following grant of the channel substitution and consummation of its assignment application. Atwood supports the allocation of Channel 267A as long as it would not negatively affect its pending application for Channel 267A at Boonville.

3. We believe the public interest would be served by substituting the channels as proposed in the *Notice*, since it could permit Station WSCP-FM at Pulaski, New York, to operate with maximum Class A facilities. Channel 267A can be allocated to Boonville, with a site restriction of 1.2 kilometers (0.7 miles) east to avoid short-spacing to Station CKUE-FM at Smiths Falls, Ontario, Canada, and can also be used at the sites proposed by the two applicants. As stated in the Notice, the applicants, The Atwood Broadcasting Corporation (851204MB) and J&S Broadcasting (851205MB),can amend their applications to specify Channel 267A and retain their filing protection since the channels are equivalent.

4. Canadian concurrence has been obtained since Boonville is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, pursuant to Sec.4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Secs.0.61, 0.204(b) and 0.283 of the Commission' Rules, IT IS ORDERED, That effective December 1, 1986, the FM Table of Allotments, Sec.73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Boonville, New York	267A

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the applicants for Channel 268A at Boonville, New York, as follows:

The Atwood Broadcasting Corporation
302 Post Street
Boonville, New York 13309
(851204MB)

J & S Broadcasting RD 3 Beaver Trail Alder Creek,
Alder Creek, New York 13303
(851205MB)

7. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-393

In re Applications of

ROBIN C. BRANDT File No. BPCT-860430KF

Christopher Gault d/b/a File No. BPCT-860606KW
GREATER DULUTH BROADCASTING

ANN WILSON File No. BPCT-860623KF
For Construction Permit
Duluth, Minnesota

HEARING DESIGNATION ORDER

Adopted: September 30, 1986 Released: October 15, 1986

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 21, Duluth, Minnesota.

2. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. No determination has been reached that the tower height and location proposed by Greater Duluth Broadcasting (Greater Duluth) and Ann Wilson would not each constitute a hazard to air navigation. Greater Duluth and Ann Wilson each has specified the overall height of its proposed tower above ground level (AGL) as 549 feet (1774 feet above mean sea level). The Federal Aviation Administration, however, has approved a tower height AGL of only 503 feet (1728 feet AMSL). Greater Duluth and Ann Wilson may each amend their respective applications to reduce the tower height to that approved by the FAA or refile with the FAA requesting the higher tower height. An appropriate contingent air hazard issue will be specified.

4. Each proposed tower is to be located 0.064 kilometers from the nondirectional tower authorized for AM station KBXT, Duluth, Minnesota. Because of the proximity of the proposed towers to KBXT, a grant of a construction permit to any of these applicants will be conditioned to ensure that KBXT's radiation pattern is not adversely affected by the proposed construction.

5. Greater Duluth and Ann Wilson each proposes to operate from a site located within 250 miles of the Canadian Border with maximum visual effective radiated power (ERP) of more than 1000 kilowatts. The proposals pose no interference threat to United States television stations; however, they contravene an agreement between the United States and Canada which limits the maximum visual ERP of United States television stations located within 250 miles of Canada to 1000 kilowatts. *Agreement Effectuated by Exchange of Notes*, T.I.A.S. 2594(1952). In the event of a grant of the application of Greater Duluth or Ann Wilson, the construction permit shall contain a condition precluding station operation with maximum visual ERP in excess of 1000 kilowatts, absent Canadian consent. *South Bend Tribune*, 8 R. R. 2d 416 (1966).

6. Greater Duluth and Ann Wilson have each submitted contour distances in Section V-C, Item 15 (tabulation of terrain data) that are inaccurate. In addition, the contour maps show contours that neither reflect the given data nor the correct data. For example, at 180 degrees the Grade B distance is given as 53.7 miles, the correct distance is 54.6 miles and the map indicates the distance to be 49.0 miles. If these applicants wish to pursue the facilities now set out in their applications (see paragraph three), they will be required to amend their applications to include corrected data in Section V-C, Item 15 (tabulation of terrain data), new contour maps and corrected area and population figures.

7. Section 73.2080(c) of the Commission's Rules requires applicants employing at least five persons full-time to file with the Commission programs designed to provide equal employment opportunities. Ann Wilson indicates that she will employ five or more full-time employees. However, Ms. Wilson has not submitted an EEO program. Greater Duluth has failed to submit Sections 1-4 of its EEO program. Accordingly, Ann Wilson and Greater Duluth each will be required to submit a copy of its EEO program to the presiding Administrative Law Judge, within 20 days after this Order is released.

8. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Greater Duluth and Ann Wilson each have submitted a facsimile certification. Accordingly, Greater Duluth and Ann Wilson each will be given 20 days from the date of release of this Order to file an original certification, in the form required by the Commission, with the presiding Administrative Law Judge.

9. Section VII, FCC Form 301 requires an original signature of the applicant, certifying that the application is true, complete and correct. Greater Duluth has submitted a facsimile signature. Greater Duluth will be required to submit a copy of Section VII, FCC Form 301 bearing an original signature, to the presiding Administrative Law Judge within 20 days after this Order is released.

10. Our review of Ann Wilson's application shows that she has not completed Section II, Page 2, FCC Form 301. Accordingly, Ms. Wilson will be required to submit a completed Section II, page 2, as an amendment to her application, to the presiding Administrative Law Judge, within 20 days after this Order is released.

11. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. If Greater Duluth Broadcasting and Ann Wilson do not amend their respective applications to conform to the tower height and location approved by the FAA, to determine, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative-basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

13. IT IS FURTHER ORDERED, That Greater Duluth Broadcasting and Ann Wilson shall each amend its application to reduce its tower height AGL to that approved by the FAA or refile with the FAA requesting the higher tower height specified in their respective applications, within 20 days after the release of this Order.

14. IT IS FURTHER ORDERED, That in the event of a grant of any of these applications, the construction permit shall be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM Station KBXT so that station may commence determining operating power by the indirect method. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, antenna impedance measurements of the AM station shall be made and sufficient field strength measurements, taken at a minimum of 10 locations along each of eight equally spaced radials, shall be made to establish that the AM radiation pattern is essentially omnidirectional. Prior to or simultaneous with the filing of the application for license to cover this permit, the results of the field strength measurements and the impedance measurements shall be submitted to the Commission in an application for the AM station to return to the direct method of power determination.

15. IT IS FURTHER ORDERED, That in the event of a grant of the application of Greater Duluth Broadcasting or Ann Wilson, the construction permit shall be conditioned as follows:

Subject to the condition that operation with effective radiated visual power in excess of 1000 kW is subject to the consent of Canada.

16. IT IS FURTHER ORDERED, That Greater Duluth Broadcasting and Ann Wilson shall each submit an amendment with respect to contour distances as set out in paragraph 6, *supra*, to the presiding Administrative Law Judge, within 20 days after the release of this Order.

17. IT IS FURTHER ORDERED, That Greater Duluth Broadcasting and Ann Wilson, shall each submit a copy of its EEO program to the presiding Administrative Law Judge, within 20 days after the release of this Order.

18. IT IS FURTHER ORDERED, That Greater Duluth Broadcasting and Ann Wilson, shall each file an original site availability certification, in the form required by the Commission, to the presiding Administrative Law Judge within 20 days after the release of this Order.

19. IT IS FURTHER ORDERED, That Greater Duluth Broadcasting shall submit a copy of Section VII, FCC Form 301 bearing an original signature to the presiding Administrative Law Judge within 20 days after the release of this Order.

20. IT IS FURTHER ORDERED, That Ann Wilson, shall submit, as an amendment to her application, a completed Section II, Page 2, FCC Form 301, to the presiding Administrative Law Judge, within 20 days after the release of this Order.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

22. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

DAVENPORT CELLULAR TELEPHONE COMPANY

File No. 32688-CL-P-098-A-84

For a construction permit to
establish a cellular system
operating on frequency block A in
the Domestic Public Cellular Radio
Telecommunications Service to
serve the Davenport-Rock Island-
Moline, Iowa/Illinois Metropolitan
Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1986; Released: October 15, 1986

By the Common Carrier Bureau:

1. A "Joint Petition to Dismiss or Deny" the captioned application was filed by "The Alliance", a group of cellular applicants who have entered into a settlement agreement for the non-wireline cellular license in Davenport-Rock Island-Moline. Cellular America, the tentative selectee for the non-wireline license in Davenport-Rock Island-Moline, entered into a settlement agreement and amended its application in favor of its new partnership Davenport Cellular Telephone Company (DCTC). DCTC opposes the Petition.

2. The Alliance argues that DCTC's application is defective for failure to demonstrate financial qualifications citing deficiencies in financing letters from ITT Credit Corporation and the Fourth National Bank of Tulsa which accompanied the Cellular America application. It also contends that DCTC failed to make necessary real party in interest disclosures. Finally, The Alliance claims that DCTC has violated nonwireline eligibility requirements.

3. DCTC asserts that its financial qualifications have in fact been established, citing to a financing letter from La Salle National Bank which it submitted with its settlement agreement. DCTC responds to allegations concerning its failure to provide a statement disclosing the subsidiaries of a business interest of members of its executive committee by indicating that it will be provided upon Commission request. Finally, DCTC maintains that it is in compliance with the Commission's nonwireline eligibility rules.

4. We find that DCTC's financial showing meets the reasonable assurance standard. Section 22.917(a)(3) of Commission's Rules, as amended requires applicants to provide balance sheets current within 90 days of the application date, and copies of financial commitments in support of the proposed facilities. DCTC has complied fully with this requirement. The financing letter from LaSalle National Bank indicating a willingness to make a loan of $2 million satisfies the standard set forth in *Multi - State Communications Inc . v . FCC*, 590 F. 2d 1117 (D.C. Cir. 1978), cert denied, 440 U.S. 959 (1979), for reasonable assurance. Inasmuch as DCTC relies upon the LaSalle letter the question as to the sufficiency of letters accompanying the Cellular America application is moot. With respect to DCTC's failure to provide information concerning the subsidiaries or business interest of members of its Executive Committee, we have held that such information is required. See *Huntington Cellular Telephone Company*, Mimeo 7087, released September 25, 1986. Consistent with our decision in that case the applicant is instructed to provide the required information within 10 days from the release date of this Order. Finally, The Alliance's claims concerning non-wireline eligibility are without merit. The Alliance has not demonstrated, nor do we find, that the two companies holding wireline interests, amounting to a combined total of approximately 20%, will have the power to control DCTC. To the contrary, DCTC is limited partnership controlled by a single general partner and that general partner is controlled by a non-wireline majority.[1]

5. After careful review of the application and the related pleadings, we find DCTC to be legally, technically and otherwise qualified to be a Commission licensee.

6. Accordingly, IT IS ORDERED, That the application of Davenport Cellular Telephone Company, File No. 32688-CL-P-098-A-84, IS GRANTED conditioned upon DCTC's obtaining the proper antenna structure clearances. The authorization does not include the right to any interference protection in any areas outside the Davenport-Rock Island-Moline, Iowa/Illinois MSA and is further conditioned upon DCTC's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

7. IT IS FURTHER ORDERED, That the petition to deny filed by the Alliance, IS DENIED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Commission has previously determined that non-controlling minority wireline interest in a non-wireline application does not run afoul of the separate cellular frequency allocation policy. See *Advanced Mobile Phone Service Inc.* (L.A. Order) 93 RR 2d 683 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

WARREN AMERICAN OIL COMPANY File No. 22216-CL-P-147-A-86

For authority to construct and operate a Domestic Public Cellular Radio Telecommunications System on Frequency Block A in the Ponce, Puerto Rico MSA

MEMORANDUM OPINION AND ORDER

Adopted October 10, 1986; Released October 24, 1986

By the Common Carrier Bureau:

1. Leonard W. Keith (Keith) and Connie J. Graham (Graham) have petitioned the referenced application. Warren American Oil Company (Warren), the first applicant selected in the nonwireline lottery held May 5, 1986, has filed a consolidated reply, opposing the petitions.

2. Keith and Graham argue that Warren's application should be denied because Warren lacks the corporate power and authority, under Texas law, to be a cellular licensee. In addition, Graham argues that Warren has failed to demonstrate that it is financially qualified to construct and operate its proposed system because it has not taken the corporate action necessary to authorize a commitment of funds to this project. Finally, Graham argues that Warren's application fails to satisfy the reporting requirements of Sections 22.13 and 22.921 of the Commission's rules. Specifically, Graham alleges that Warren fails to disclose that 41.72 percent of its stock is owned by Medical Research, Inc.

3. Warren responds that its articles of incorporation have been amended to provide a general purposes clause permitting business endeavors of this kind. It also states that it has set aside $1.5 million for the purpose of construction and operation of the Ponce system by unanimous agreement of its board of directors. Finally, Warren reasserts that its disclosure for purposes of compliance with Sections 22.13 and 22.921 of the rules is accurate in all respects and that Medical Research's ownership interest was in fact disclosed.

4. After a review of the application and related pleadings, we find the petitioners' claims to be without merit. First, the question as to whether or not Warren has the corporate authority to engage in cellular activities inasmuch as it requires an interpretation of Texas state law is not properly raised here. That notwithstanding, Warren has demonstrated that its articles of incorporation in fact do permit it to pursue the business of providing cellular service. Similarly, the objection raised as to availability of financing is without merit. Graham does not dispute the fact that the requisite funds are available. Moreover, Warren has affirmatively indicated that these funds have been committed to the construction of the system. Finally based upon our examination of the record we can find no violation of Section 22.13 and 22.921.

5. After careful review of the application and the related pleadings, we find Warren to be legally, technically and otherwise qualified to be a Commission licensee.

6. Accordingly, IT IS ORDERED that the application of Warren American Oil Company, File No. 22216-CL-P-147-A-86, IS GRANTED conditioned upon Warren's obtaining the proper antenna structure clearances. The authorization does not include the right to any interference protection in any areas outside the Ponce MSA and is further conditioned upon Warren's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

7. IT IS FURTHER ORDERED, that the petitions to deny filed by Leonard W. Keith and Connie J. Graham, ARE DENIED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-85-5

In the Matter of

INDIANAPOLIS TELEPHONE COMPANY,

Complainant,

v.

INDIANA BELL TELEPHONE COMPANY, INC. and AMERICAN INFORMATION TECHNOLOGIES CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986; Released: October 16, 1986

By the Chief, Common Carrier Bureau:

1. Before the Bureau is a complaint filed by Indianapolis Telephone Company ("ITC"), a non-wireline cellular carrier providing cellular service in the Indianapolis, Indiana area. The complaint alleges that defendant Indiana Bell's insistence on certain technical-physical and financial interconnection arrangements constitutes a failure to provide ITC reasonable interconnection in violation of Sections 201(a) and 202 of the Communications Act of 1934 ("Act"), 47 U.S.C. §§ 201(a), 202, and of the Commission's *Cellular Decisions*.[1] In addition, ITC charges that Indiana Bell and American Information Technologies Corporation ("Ameritech") have engaged in anticompetitive behavior in violation of Section 314 of the Act, 47 U.S.C. § 314.[2] Finally, in a supplemental complaint, ITC asserts that Indiana Bell provided interconnection to ITC's wireline competitor, GTE Mobilnet, at terms more favorable than those it had offered to ITC in further violation of the antidiscrimination provisions of Section 202 of the Act. In their respective answers, Indiana Bell denies that it engaged in any Communications Act violation, and Ameritech claims that it is not a proper party to the proceeding. As set forth more fully below, we dismiss the complaint.

I. BACKGROUND AND CONTENTIONS

2. Soon after the pleading cycle had ended, the parties, at the request of the Bureau's Enforcement Division, entered into settlement negotiations in an attempt to resolve the matters in controversy. As a result of these negotiations the parties have reached a partial settlement which resolves the technical-physical interconnection issues raised in ITC's complaint. Each of the parties has filed separate motions to dismiss on this issue.[3] The parties agree that the provisions of the settlement agreement constitute full and complete satisfaction of the technical-physical aspects of the interconnection arrangement ITC is requesting. The settlement agreement appears reasonable, since it provides for a mutually acceptable physical interconnection arrangement between the parties. Therefore, we will grant the parties' motions to the extent they seek to dismiss that portion of ITC's complaint involving tehnical-physical interconnection arrangements. The parties have failed however, to reach an accord resolving ITC's requests for financial arrangements with Indiana Bell, allegations of anticompetitive behavior on the part of both defendants, and allegations of discriminatory behavior on the part of Indiana Bell.

3. In support of its argument that Indiana Bell's financial arrangements are unreasonable and discriminatory, ITC asserts that Indiana Bell has refused to share the cost and revenues of shared facilities and to enter into an "originator pays" billing arrangment whereby Indiana Bell and ITC would each be responsible for billing and collecting for calls originating from their respective subscribers.[4] Central to ITC'S complaint is its contention that the *Cellular Decisions* found that cellular carriers are no different from landline carriers and thus should be entitled to the same treatment with respect to interconnection. The gravamen of ITC's complaint is that Indiana Bell has failed to negotiate with ITC on a carrier-to-carrier basis and accord it the same interconnection treatment provided to telephone companies. ITC avers that this refusal constitutes a violation of the provisions of Sections 201(a) of the Act requiring the establishment of through routes and divisions of revenues between interconnecting carriers as well as the terms of Section 202 prohibiting unreasonable discrimination. ITC seeks an order directing Indiana Bell to provide interconnection which includes a financial arrangement similar to that entered into by Indiana Bell and local exchange carriers, including the sharing of costs and revenues and an "originator pays" billing arrangement.

4. In addition, ITC alleges that Ameritech's 37 percent interest in GTE Mobilnet and its ownership of 100 percent of Indiana Bell have had the effect of substantially lessening competition between ITC and GTE Mobilnet in violation of Section 314 of the Act. Specifically, ITC contends that Ameritech's substantial stock ownership interests in Indiana Bell and GTE Mobilnet create an incentive on the part of the defendants to engage in anticompetitive behavior favoring GTE Mobilnet to the detriment of ITC. Thus, ITC argues that Indiana Bell and Ameritech have used their control of facilities to delay interconnecting ITC's facilities with Indiana Bell's local network and to refuse to provide ITC reasonable interconnection arrangements which would permit it to compete more effectively with GTE Mobilnet. Accordingly, ITC requests the Commission to order Indiana Bell to cease and desist from all behavior that lessens competition between ITC and GTE Mobilnet although it did not identify any specific anticompetitive behavior in the original complaint. Finally, ITC contends in its supplemental complaint that Indiana Bell is violating Section 202 of the Act, by providing GTE Mobilnet with interconnection at rates substantially lower than rates assessed ITC. It requests the Commission to order Indiana Bell to cease and desist the alleged discrimination and to refund to ITC the difference between the charges it assessed GTE Mobilnet and those it billed ITC.

5. Indiana Bell denies that it has acted unreasonably, discriminatorily, anticompetitively or in bad faith in establishing interconnection arrangements with ITC. It asserts that it provides ITC the same financial interconnection arrangement it provides ITC's wireline cellular competitor, GTE Mobilnet. It states that ITC has requested a financial arrangement different from that provided to GTE Mobilnet and claims to have negotiated in good faith with ITC

to arrive at a mutually acceptable arrangement. Indiana Bell asserts, however, that the type of financial arrangement ITC is demanding is unreasonable because ITC is not a local exchange carrier. Rather, it argues that it has met its obligation to provide "reasonable" interconnection to ITC. Moreover, Indiana Bell maintains that financial interconnection arrangements for cellular service requested here involve wholly intrastate communication and are, thus, essentially rate matters which the Commission has held to be a state, not a federal, concern. Accordingly, Indiana Bell asserts that the Commission should refrain, for jurisdictional reasons, from prescribing the financial arrangement ITC is demanding.

6. In response to ITC's supplemental complaint, Indiana Bell admits that from May to October 1984 it billed GTE Mobilnet less than ITC for equivalent interconnection arrangements and facilities. This disparity in treatment, claims Indiana Bell, was due to an administrative error which it did not discover and correct until October 1984. Although it began billing the two cellular carriers the same applicable tariff rate at this time, it did not credit ITC the amount it was due as a result of the disparity until November 1985. Notwithstanding this delay, Indiana Bell maintains that ITC's supplemental complaint has been satisfied and thus should be dismissed as moot.

7. For its part, Ameritech asserts that it should be dismissed as a defendant in this proceeding because it is not a common carrier subject to the Commission's jurisdiction in a complaint proceeding. Furthermore, Ameritech argues that ITC's allegation that it has engaged in anticompetitive conduct lies outside the subject matter jurisdiction of the Commission in a complaint proceeding.

II. DISCUSSION

8. In its *Cellular Decisions* the Commission established a regulatory framework for the licensing and operation of commercial cellular systems. Balancing public policy interests, including the promotion of efficient use of the spectrum, competition and the rapid implementation of cellular service, the Commission limited its grant of licenses to two per market, allocating one 20 MHz frequency block to the wireline carrier and another to a non-wireline carrier. The Commission stated that this approach "constitutes the most practical, and quite possibly the only, way to achieve the Commission's twin goals of making quality mobile telephone service available to the public as rapidly as possible while promoting competition whenever feasible." *Reconsideration Order*, 89 FCC 2d at 70. In response to competitive concerns involving wireline participation, the Commission adopted interconnection provisions intended "to insure that wireline carriers provide reasonable interconnection to non-wireline cellular systems and to mitigate any potential anticompetitive effects stemming from the separate frequency allocation policy." 90 FCC 2d 571, 577 (1982) (citing *Reconsideration Order*, 89 FCC 2d at 72, 81; and *Order*, 86 FCC 2d at 491-92, 496). Accordingly, the Commission established the following requirements for interconnection of non-wireline cellular carriers:

(1) Every landline telephone carrier has an obligation to provide reasonable interconnection to cellular systems regardless of whether the landline telephone carrier seeks to provide cellular service itself.

(2) Every non-wireline cellular carrier has the right to interconnect with the landline network in the identical manner as does the wireline cellular system with comparable switching serving the same area.

(3) Where a non-wireline cellular carrier seeks interconnection arrangements different from those of a wireline cellular carrier, it may negotiate other interconnection arrangements with the local landline telephone company.

(4) In every circumstance the landline telephone carrier is under the duty to provide interconnection to a non-wireline cellular carrier that is reasonable and technically suitable for the non-wireline's system. *Reconsideration Order*, 89 FCC 2d at 81-82; *Further Reconsideration Order*, 90 FCC 2d at 577. The Commission emphasized, however, that "[its] assertion of federal primacy focuses on entry qualifications and in accordance with Sections 2(b) and 221(b) of the Act, reserves to the states jurisdiction with respect to charges, classifications, practices, services, facilities or regulations for service by licensed carriers." *Reconsideration Order*, 89 FCC 2d at 96.

9. The initial question presented is whether Indiana Bell has provided ITC with reasonable interconnection in accordance with the Commission's rules and policies. In contending that its interconnection arrangement with Indiana Bell is unreasonable, ITC argues that it must be permitted to enter into an accord similar to that Indiana Bell has with independent telephone companies governing the sharing of costs and revenues associated with interconnecting their respective wireline networks. We disagree. While the *Cellular Decisions* sought to assure that wireline and non-wireline cellular carriers were placed in the same competitive position, they do not provide that cellular operations, although regarded as local exchange carriers for some purposes, should be considered equivalent to landline telephone operations and thus subject to all the same financial arrangements. Rather, the Commission adopted a policy in "favor of a general entitlement of reasonable interconnection."[6] In so doing, the Commission stated that it expected all telephone companies to furnish appropriate interconnection to non-wireline cellular carriers "upon terms no less favorable than those offered to the cellular systems of affiliated entities or independent telephone companies."[6] The Commission's central concern regarding the requirement that telephone companies provide reasonable interconnection is that the connection is nondiscriminatory and technically sufficient to provide cellular service.[7] While it is explicit that when the non-wireline cellular carrier is provided interconnection identical to that provided the wireline cellular carrier, the nonwireline cellular carrier also has a right to the same financial arrangements, the *Cellular Decisions* are devoid of any discussion mandating a particular type of financial arrangement governing interconnection. Therefore, contrary to ITC's contention, there is no basis in the Commission's *Cellular Decisions* to support the conclusion that "reasonable interconnection" requires an arrangement that is equivalent or similar to such arrangements between two local landline telephone carriers.

10. Moreover, even if the term "reasonable interconnection" could be construed to require the type of financial arrangement ITC is requesting, this Commission does not have jurisdiction over particular aspects of carrier-to-carrier financial arrangements, including "originator pays" billing arrangements, between cellular carriers and local landline telephone companies where these arrange-

ments relate solely to intrastate communications. This position was recently reaffirmed by the Commission in a policy statement intended to provide guidance to cellular carriers and telephone companies in negotiating reasonable interconnection agreements.[8] In its *Policy Statement on Interconnection of Cellular Systems* the Commission stated that compensation arrangements for cellular interconnection were properly left to negotiations between the carriers involved or, in the end, subject to state regulatory jurisdiction. Thus, as long as the non-wireline carrier is treated in the same manner as the landline telephone company's affiliated cellular operations, particular aspects of financial arrangements between cellular and landline carriers are matters within the purview of the appropriate state regulatory agency. *American Mobile Cellular Communications Corporation v . Advanced Mobile Phone Service Inc .*, Mimeo No. 4979 (released June 22, 1984); *Mobilefone , Inc 65 FCC 2d 848, 859* (1977); *cf. New York Telephone Co.*, 76 FCC 2d 349, *recon . denied* , 81 FCC 2d 128 (1980), *c'd sub nom . New York Telephone Co . v . FCC*, 631 F.2d 1059 (2d Cir. 1980). While we encourage carriers to negotiate in good faith where the non-wireline carrier desires unique interconnection arrangements, we do not intend to step in when such negotiations break down where solely intrastate communications are involved. The instant complaint involves financial arrangements governing interconnection to Indiana Bell's local exchange network relating to wholly intrastate communications, and under the facts presented herein, we conclude that this Commission is not the appropriate forum for its resolution.[9] We therefore will dismiss this portion of the complaint.

11. We next address ITC's claim that Indiana Bell and Ameritech have engaged in anticompetitive behavior in violation of Section 314 of the Act. ITC offers no factual support for its allegations that Ameritech's ownership of Indiana Bell and financial interest in GTE Mobilnet, by themselves, serve to substantively lessen competition in the Indianapolis cellular services market. We note that the Commission in the *Cellular Decisions* rejected similar arguments that simultaneous ownership of wireline and radio communications facilities would be anticompetitive. It stated that the benefits of permitting a wireline company to offer cellular services outweighed any potential disadvantages, including the possibility that a wireline carrier, by virtue of its monopoly position in offering landline telephone services, could disadvantage its non-wireline competitor.[10] Absent any evidence of anticompetitive conduct, we find no merit in ITC's claim that defendants have violated Section 314 of the Act.[11]

12. With regard to ITC's claim in its supplemental complaint that Indiana Bell provided interconnection to GTE Mobilnet at rates substantially lower than the rates it assessed ITC in violation of Section 202 of the Act, it appears that the matter has been resolved. ITC alleges that between May and October 1984 Indiana Bell provided GTE Mobilnet interconnection services at $22 per cellular interconnection trunk while charging ITC $90 to $180 for the same trunks over the same period. While Indiana Bell admits that it billed GTE Mobilnet less than ITC for equivalent interconnection facilities in mid-1984 it explains that the discrepancy was due to an administrative error. Initially, states Indiana Bell, ITC and GTE Mobilnet were offered a standard radio common carrier ("RCC") interconnection which incorporated by reference the state tariff rate applicable to RCCs. Although ITC did not sign the agreement, it was charged the same rate for interconnection services as GTE Mobilnet, which had signed the agreement. In May 1984 however, Indiana Bell discovered that it should have been charging the lower cellular tariff rate. At that time, contends Indiana Bell, it began charging ITC the appropriate tariff rate for cellular service but that due to an administrative error, it continued to bill GTE Mobilnet at the RCC tariff rate. Indiana Bell claims that the oversight was inadvertent and was immediately corrected when discovered in October 1984. Indiana Bell adds that ITC has been credited for the difference between the tariff rates and the rates actually charged GTE Mobilnet. The record before us supports Indiana Bell's explanation of how the erroneous billing occurred and its claim that it has taken the appropriate steps to satisfy the complaint. We are persuaded that the administrative error which led to the temporary disparity in rates was inadvertent and has been corrected.[12] Accordingly, we will dismiss ITC's supplemental complaint since Indiana Bell has satisfied that claim.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Motion filed by Indianapolis Telephone Company requesting partial dismissal of its complaint against Indiana Bell and Ameritech IS GRANTED.

14. IT IS FURTHER ORDERED that the complaint filed by Indianapolis Telephone Company IS DISMISSED.

15. IT IS FURTHER ORDERED that the supplemental complaint filed by Indianapolis Telephone Company IS DISMISSED.

16. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Indiana Bell requesting dismissal of the above-captioned complaint IS GRANTED to the extent set forth above and otherwise DISMISSED.

17. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Ameritech IS GRANTED to the extent set forth above and is otherwise DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Cellular Communications Systems, 86 FCC 2d 469 (1981) (" *Order* "), *recon.*, 89 FCC 2d 58 (1982) (" *Reconsideration Order* "), *further recon.*, 90 FCC 2d 571 (1982) (" *Further Reconsideration Order* ") (collectively," *Cellular Decisions* ").

[2] Indiana Bell, a wholly owned subsidiary of Ameritech, a regional holding company, is a local exchange wireline telephone company certificated by the Indiana Public Service Commission ("PSC") to provide local exchange service in the state of Indiana.

[3] All parties seek dismissal of the complaint with respect to the technical-physical issues. In addition, both Indiana Bell and Ameritech request dismissal of the remaining issues raised in the complaint.

[4] We note that ITC's allegations regarding the reasonableness of its financial interconnection arrangements with Indiana Bell involve only compensation for local exchange calls and make no reference to compensation for interstate, interexchange calls.

[5] *Further Reconsideration Order*, 90 FCC 2d at 577.

[6] *Order*, 86 FCC 2d at 496.

[7] The Commission stated that "the right to identical interconnection arrangements . . . provides non-wireline carriers with the assurance that they can obtain equal interconnection arrangements should the negotiations for different arrangements prove unfruitful." *Reconsideration Order*, 89 FCC 2d at 82.

[8] *See*, In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers, FCC 86-85, Appendix B (released March 5, 1986).

[9] In this regard we note that the reasonableness of Indiana Bell's charges for providing ITC interconnection are presently before the Indiana PSC.

[10] *Order*, 86 FCC 2d at 486.

[11] Since we are rejecting ITC's allegation that the defendants have engaged in anticompetitive behavior for failure to substantiate its claim, we need not address Ameritech's defense that the Commission lacks subject jurisdiction over the allegation. Similarly, in view of our disposition of the merits of ITC's complaint, we need not address Ameritech's motion to dismiss on the grounds that it is not a proper party to this proceeding. We will therefore dismiss the motion.

[12] We note that while Indiana Bell discovered and corrected the billing error in October 1984, it did not refund ITC the amount it was due until November 1985. In light of this inordinate delay we remind Indiana Bell of its duty to deal with its customers and other carriers in a good faith manner and of its obligation to adhere to its tariff and the policies and regulations of this Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: October 15, 1986

Robert W. Healy, Esq.
Gordon and Healy, Chartered
1821 Jefferson Place, N.W.
Washington, D.C. 20036

Re: Offshore Telephone Company

Dear Mr. Healy:

This letter concerns the Offshore Telephone Company's (OTC's) pending Petition for the Issuance of a Writ of Mandamus (Petition) filed against the Commission in the United States Court of Appeals for the District of Columbia.[1] In its Petition, OTC asks the Court to direct the Commission to act on the remaining portion of a Complaint filed by OTC against the American Telephone and Telegraph Company (AT&T) and the South Central Bell Telephone Company (SCB). OTC seeks, in its Complaint, damages for alleged discriminatory practices of AT&T and SCB, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), for refusing to enter into a toll sharing arrangement with OTC to provide interstate toll service between the Gulf of Mexico and the United States mainland. In addition, OTC requests that the Court order the Commission to determine OTC's status with respect to membership in the National Exchange Carrier Association (NECA).

This letter addresses OTC's latter request. As you may know, NECA was created by the Commission to prepare access tariff filings and act as the administrator of access charge revenue pools as a result of the divestiture of the Bell System and the establishment of access charge requirements by the Commission which replaced most of the pre- divestiture interstate settlements arrangements. *See* 47 C.F.R. § 69.601. In accord with Section 69.601(a), 47 C.F.R. § 69.601(a), NECA files access tariffs, pools access costs and revenues and distributes the pooled funds to member organizations. While membership in pools other than the carrier common line (CCL) pool is voluntary, qualified carriers are required to participate in NECA's CCL pool to share in CCL revenues. In addition, member carriers are required, *inter alia*, to comply with Commission Rules concerning common carriage, including Parts 61, 67 and 69, 47 C.F.R. Parts 61, 67 and 69, relating to tariff filing requirements, jurisdictional separations procedures and access tariffs, respectively. As stated in the Commission's response to OTC's Petition in the Court of Appeals, OTC has never squarely presented the Commission with the issue of whether it is entitled to be a member of NECA. Moreover, OTC has not provided data and information from which determinations could be made, under the Communications Act, regarding whether OTC is providing exchange access service and whether its costs and revenues should be pooled with those of current members of NECA's pools. OTC's brief in the mandamus proceeding implies, however, that the company intended to make such a request by way of the various letters and pleadings related to its pending complaint.

Although OTC should have filed a petition for declaratory ruling, we will treat these documents as OTC's formal request to participate in NECA. Inasmuch as we desire to resolve OTC's carrier status as expeditiously as possible, OTC is directed to respond completely but concisely to the questions attached as Appendix A to this letter. OTC's response must be accompanied by an affidavit of an officer of OTC certifying that the response is accurate and complete in all respects. OTC may rely on evidence and other material compiled in its pending Complaint, provided that such information is directly relevant to the inquiries made herein. OTC is directed, however, to resubmit all the data on which it intends to rely, revised to reflect current circumstances. In addition to responding to the specific inquiries raised herein, OTC is free to address policy considerations insofar as it believes they affect its request. OTC is reminded that it has the burden of demonstrating that its request is reasonable.

OTC's response should be filed with the Secretary, Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554. The response, which should reference this letter, must be filed not later than November 14, 1986. OTC's response will be made available for public inspection and comment. Comments in response to OTC's filing are due not later than December 15, 1986. OTC's Reply Comments are due not later than December 30, 1986.

Sincerely,

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

APPENDIX A

Question 1:

Furnish a diagram and description demonstrating how your network facilities furnish both on-network and off-network services. The accompanying material should indicate how on-network and off-network service, if any, is furnished to OTC customers and subscribers. Your response should include a diagram of the number and location of oil rigs and other locations served by your communications facilities, and should indicate which, if any, are mobile structures. (For the mobile structure, indicate the period during which structures are to be situated in each location, and the frequency of locational changes over the past three years.) In addition, your answer should:

(a) Identify OTC switching facilities by brand and model and the number of lines and trunks which the facilities are capable of handling.

(b) Identify the mix of OTC transmission media used (*e . g .*, wire pairs, coaxial cable, microwaves, *etc.*).

(c) Explain how calls are completed on a dial-up switched basis.

Question 2:

Furnish copies of all of OTC's state certifications, registrations, and tariffs, if any, on file with any state commission.

Question 3:

How many main telephone stations were provided by OTC in 1985 and 1986?

How many were coin? Business? Residential?

Question 4:

For each OTC connection with the facilities of another telephone company, specify:

(a) The name of the interconnecting telephone company.

(b) The location of the connection.

(c) The OTC and other telephone company equipment and facilities comprising the connection.

(d) The number of private line, FX, message, and other circuits connected.

(e) The method by which message traffic is handed off by OTC, the method by which message traffic is switched (the type of facilities used and whether OTC or the connecting carrier performs switching functions), and participation required by OTC telephone operators and connecting carrier telephone operators.

Question 5:

How many circuits were provided by OTC over facilities owned by OTC in 1984, 1985 and 1986?

How many of the circuits provided in 1984, 1985 and 1986 were provided over:

(a) Domestic Public Land Mobile Radio Equipment?

(b) Rural Radio Equipment?

(c) Offshore Radio Telephone Service Equipment?

(d) Point-to-point microwave only, submarine cable only or a combination of the two (but not over any other radio equipment)?

Question 6:

For OTC message services in 1984, 1985 and 1986:

(a) Provide the total number of messages and message minutes.

(b) How many messages or message minutes both originated and terminated at points in the OTC service area?

(c) How many messages or message minutes originated or terminated at points in the South Central Bell Morgan City exchange? Beyond Morgan City?

Question 7:

For OTC private lines in 1984, 1985 and 1986:

(a) How many both originated and terminated at points within the OTC service area?

(b) How many originated or terminated at points in the South Central Bell Morgan City exchange? Beyond Morgan City?

Question 8:

Supply a copy of the most recent FCC Form M, formal or informal, filed by OTC. Supply a copy of OTC's annual balance sheet, earnings statement, income statement and statement of profit or loss for 1985. Include stockholders reports and annual reports. Include also a statement of plant investment, investment income, retained earnings, revenues and expenses comparable to that in FCC Form M, Schedules 10 (Balance Sheet), 11 (Income, retained Earnings), 12A (Telephone Plant Accounts), 12B (Retired Plant), 34 (Operating Expenses) and 36A (Taxes).

Question 9:

Demonstrate how OTC complies (or proposes to comply) with the jurisdictional separations procedures established in Part 67 of the Commission's Rules, 47 C.F.R. Part 67. Specify in detail the procedures and methodologies OTC uses (or proposes to use) to achieve such compliance.

Question 10:

Indicate the NECA pools which OTC wishes to join. For the NECA pools in which OTC wishes to participate provide a detailed description of the estimated effect of the pooling process(es) on OTC's revenues. Your answer should explain how each estimate was calculated and should indicate:

(a) OTC's estimated contribution to the pool(s).

(b) For each pool, the estimated net payment OTC expects to receive from pooled funds.

(d) For each pool, the estimated effect of pool participation on OTC's rates and revenues.

(e) The estimated overall effect of pool participation on OTC's traffic *i . e .*, estimated traffic stimulation or repression).

FOOTNOTES

[1] *See* In re Offshore Telephone Company, No. 86-1059 (D.C. Cir. 1986).

PUBLIC NOTICE

Released: October 15, 1986

OFFSHORE TELEPHONE COMPANY REQUESTS PERMISSION TO PARTICIPATE IN NATIONAL EXCHANGE CARRIER ASSOCIATION POOLS.

Offshore Telephone Company (OTC) has requested the Commission to determine its status with respect to membership in the National Exchange Carrier Association (NECA). OTC is authorized, in accord with Section 214 of the Communications Act, 47 U.S.C. § 214, to provide common carrier communication services in the Gulf of Mexico through submarine cable, microwave, rural radio and Offshore Radio Telephone Service (ORTS). To aid our resolution of its request, OTC has been directed to respond to the questions appended to the attached letter. OTC's response is due not later than November 14, 1986. OTC's response will be made available for public inspection in the Tariff Division's Public Reference Room, 1919 M Street, N.W., Room 513, Washington, D.C.

Comments in response to OTC's filing should be filed not later than December 15, 1986. Reply comments are due not later than December 30, 1986. Comments and reply comments must be filed with the Secretary, Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554 and should reference the attached letter. For further information, contact Jacqueline Holmes or Jim Lichford of the Tariff Division at (202) 632-6917 or (202) 632-5550.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Ameritech Operating Companies' Petition for Waiver of Section 64.702 of the Commission's Rules (*Computer II*) to Provide Protocol Conversion as an Adjunct to a Basic Packet Switched Network — AAD 6-1424

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 1986 **Released: October 20, 1986**

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. On April 22, 1986, four Ameritech Operating Companies -- Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company and The Ohio Bell Telephone Company (hereinafter referred to collectively as "Ameritech") -- filed a plan (the Compliance Plan) which purportedly demonstrates compliance with the requirements of the Commission's *Protocol Waiver Order*.[1] In addition, Ameritech filed a petition for waiver of the separate subsidiary requirements of the *Computer II* rules[2] to permit joint marketing and billing of protocol conversion with its basic packet switching service. Ameritech notes that its compliance/waiver request is being filed in two stages. The instant pleading involves its intraLATA, intrastate service alone. It states that it will file interLATA access tariffs with the Commission "very shortly." For the reasons set forth below, we accept Ameritech's Compliance Plan and grant its joint marketing and billing waiver, subject to the conditions set forth herein.

II. BACKGROUND

2. Under Section 64.702 of the Commission's rules,[3] common carriers may offer enhanced services, including protocol conversion,[4] on an unregulated basis and must obtain under tariff the basic services underlying their enhanced offerings. In the *Third Computer Inquiry*, the Commission replaced structural separation for the enhanced services of AT&T and the Bell Operating Companies (BOCs) with nonstructural Safeguards.[5] However, the BOCs are still required to provide certain types of protocol conversion on a collocated basis only pursuant to the requirements set forth in the *Protocol Waiver Order*.

3. In April and May, 1984, several BOCs petitioned for waivers of Sec. 64.702 of the Commission's rules to offer an X.75 interface (an internetworking interface) within basic X.25 packet switched networks, and to allow conversion of asynchronous transmissions to the X.25 protocol. Asynchronous-X.25 conversion allows most personal computers and many other kinds of asynchronous data terminals to communicate via packet-switched networks with host computers that send and receive data in the X.25 format. Specifically, the petitioners asked the Commission for permission to collocate protocol conversion equipment in their central offices and to waive most or all of the structural separation conditions which would ordinarily apply to an enhanced services offering by a BOC.

4. The Commission granted the X.25-X.75 proposals in November, 1984.[6] After requesting further information from the BOCs, it granted all but one of the waiver requests for asynchronous-X.25 protocol conversion.[7] The Commission concluded that the public interest would be served by allowing the BOCs to place asynchronous-X.25 protocol conversion capabilities within their central offices in order to achieve certain efficiencies which would significantly reduce data transport prices to customers. *Protocol Waiver Order* at 1090. It also found that permitting the provision of protocol conversion services within the network would enable the BOCs to serve customers not effectively served by existing packet switching providers. *Id.* Most importantly, the Commission believed that the diversion of data traffic from circuit-switched voice facilities onto more efficient local packet switched networks could eliminate the need for costly construction of new voice facilities which might otherwise be required to handle future increases in data traffic. *Id.* at 1089-90.

5. Notwithstanding these conclusions, the Commission noted that an unconditional waiver of the *Computer II* rules might present the BOCs with opportunities for misallocation of costs or other anti-competitive behavior. Therefore, the Commission limited the scope of the waivers to allow the BOCs only to place protocol equipment within their central offices and to install and maintain any such collocated equipment. It did not grant permission for the BOCs to market protocol conversion services. Absent further showings, the Commission required the asynchronous-X.25 conversion services to be marketed through the enhanced services subsidiary, which would reimburse the telephone company for the investment and costs of providing the enhanced portion of the packet switched services to the subsidiary. To that end, the Commission ordered each BOC to file an accounting plan designed to allocate to the BOC's separate enhanced services subsidiary all direct and indirect costs associated with installing and maintaining the protocol equipment. *Id.* at 1099-1101.

6. In addition to the accounting requirements, the Commission placed three conditions on asynchronous-X.25 protocol conversion offerings. First, it required the BOCs to take the inter-office circuits used for their packet switched networks on the same terms and conditions which govern the use of those circuits by their competitors. This condition is intended to prevent the BOCs from using their monopoly control over such circuits to "squeeze" out others who might wish to use the circuits similarly to provide enhanced packet switched data transmission services. (See generally, *id.* at 1093-95, 1104-07).

7. Second, the Commission directed the BOCs to include in their basic (X.25) packet switching tariffs a network utilization rate element (NURE) which must be paid by the BOC's separate subsidiary when it uses basic service to provide a customer with enhanced (asynchronous-X.25) packet services. This condition is intended to charge users of the enhanced service for the costs of any operational inefficiencies which protocol conversion imposes upon the network. *Id.* at 1107-09. As an incidental effect, the price differential which the NURE creates between asynchronous-X.25 service also preserves the incentives for development of protocol conversion capabilities within customer premises equipment. *Id.* at 1095.

8. The Commission's third condition requires the BOCs to provide end users with equal access both to the protocol conversion offerings of the BOC's separate enhanced services subsidiary and to the protocol conversion offerings of other service providers. This condition requires the BOCs to make such access available on an unbundled, tariffed basis, without discrimination between BOC protocol conversion facilities and those of others. In particular, it prohibits offering of data-over-voice (DOV) access to the BOC network unless the BOC offers DOV access to the offerings of other enhanced service providers. This requirement also mandates that "dialing parity" be made available on a comparable basis to other enhanced service providers. For instance, if abbreviated dialing is used to reach the BOC's packet switched service, comparable dialing must also be available to customers of other enhanced service providers. *Id.* at 1109-12.

9. The third condition also affects the terms by which the BOC provides to its separate subsidiary the connection between the subsidiary's protocol conversion equipment and BOC subscribers. The collocation waiver permits these connections to be made using intra-office wire rather than local loops so that the BOC may derive cost savings equal to the difference between the tariff prices the BOC's affiliate will pay for the intra-office connections and the tariff prices which other packet switched service providers must pay for the loops through which they connect with BOC central offices. *Id.* This condition, therefore, requires the BOCs to identify and explain these cost savings in the support material account *Id.* at 1104-07.

10. Finally, the Commission stated that it would grant further waivers allowing the BOCs to market protocol conversion jointly with basic packet switching if the following conditions are met: [E]ach BOC seeking approval of a specific marketing plan must make a probative and fully documented filing that demonstrates: (1) how the costs of marketing asynchronous format compatible packet services by unseparated telephone company personnel will be identified and excluded from "above-the-line" regulatory documents; (2) what marketing information, if any, will be available (and on what basis) to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to vend asynchronous format-compatible packet switched services to the BOCs' basic telephone service subscribers; and (3) how the petitioner's marketing proposals relate to conditions #2 and #3 which we are adopting herein.[8] (footnote omitted.)

III. AMERITECH'S PROPOSAL

A. General

11. Ameritech designed its packet switched network (PSN) as an optional data transmission service to transport bursty, interactive traffic. The PSN provides for communication on a shared local data network between such devices as personal computers, terminals, or host computers. These communications may be private, as in intra-company applications, or public, such as access to a public information service provider's database. The PSN itself consists of packet switches, packet assemblers/disassemblers (PADs), interoffice transmission facilities, and network control and management systems.

12. Access to the PSN can be gained through either dial-up or direct connections to either the PADs or to the packet switches. Dial-up access is achieved through the serving circuit/voice switched network, generally accepting data in the asynchronous format at speeds of up to 1200 bps. Michigan Bell also offers an X.25 dial-up service at 1200 bps. Dial-up access provides for call origination capabilities only. Dedicated access is offered via analog or digital private lines, accepting data in either the asynchronous, synchronous, or X.25 formats. Dedicated access provides both call origination and call termination capabilities at speeds from 50 bps to 56 Kbps. Dedicated X.25 access to the packet switch is only offered at 9.6 or 56 Kbps. Non-X.25 access requires a connection to the PAD to convert the data into packets utilizing the X.25 standard packet protocol for routing through the network.

B. Accounting Plan

13. Ameritech's accounting plan is described in Appendix C to its filing. Ameritech states that this plan will be used by each Ameritech Operating Company to identify and record the investment, expenses and revenues of the Packet Switched Network (PSN) and those associated with providing protocol conversion. It notes that the plan was developed in compliance with the Commission's Fifth Report and Order in CC Docket No. 81-893 (*Fifth Report and Order*), FCC 84-547 (released November 20, 1984), and that in developing the plan it was guided by the Bureau's decision in File No. ENF 84-22.[9] It further notes that this is an interim plan pending the outcome of the *Third Computer Inquiry*[10] and the proceeding involving the allocation of costs between regulated and nonregulated services.[11] According to Ameritech, the application of this accounting plan precludes the cross-subsidization of protocol conversion services by the assignment of all relevant costs to the company's established nonregulated account (Account 106). Ameritech describes relevant costs as those costs, including overheads, which have an associable cause-and-effect relationship with the provisioning of protocol conversion. 14. Ameritech states that investment costs for the packet switched network (PSN) include physical hardware costs (switching equipment, packet assembler/disassembler, power, common equipment, and modules), supply expense, and engineering and installation costs. These costs, according to Ameritech, originate from the packet switching vendors' bills and telephone company material, engineering and labor charges, and will be recorded using unique field reporting codes (FRCs) identifying all appropriate costs.

15. Ameritech states that a protocol conversion investment factor (PCIF), which is the ratio of protocol conversion investment to total packet switching investment, will be developed to allocate PSN central office investment costs to protocol conversion. Additionally, Ameritech notes, supporting investment (land and buildings) for protocol conversion will be developed using loading factors which are derived as a percent of investment to average gross central office equipment investment, by account, on a company wide basis. Ameritech also states that overhead investment will be determined by applying investment related loading rates developed by telephone company accounting departments to protocol conversion salary and wage expenses.

16. Investment related costs for protocol conversion, according to Ameritech, will be determined by applying appropriate carrying charges for each type of investment (land, buildings central office, etc.) to total protocol conversion investments. The carrying charge rate will be developed annually, Ameritech states, and will include components of return on investment, taxes, and depreciation, as appropriate.

17. Ameritech explains that expenses associated with protocol conversion will be directly charged where possible. In those cases where direct assignment is not possible, allocation procedures will be used. PSN central office maintenance expenses, for example, will be allocated to protocol conversion using the PCIF mentioned in para. 15, above. Advertising and marketing expenses for protocol conversion will be charged directly to Account 106 where possible; where not, they will be allocated based on the ratio of protocol conversion revenues to total packet switching revenues. Customer accounting expenses will be allocated to protocol conversion based on the ratio of protocol conversion lines of billing to total lines of billing of all PSN bills. General and supplemental overhead expenses will be determined by applying overhead loading rates developed by telephone company accounting departments to the salary and wage expenses associated with protocol conversion. The salary and wage costs will be identified by applying the appropriate wage portion of accounts ratios (WPARs) to the departmental expenses allocated to protocol conversion.

18. According to Ameritech, all revenues for PSN and protocol conversion services will be assigned unique Universal Service Order Codes (USOCs) or usage rate elements. Basic PSN revenues will be identified in the appropriate revenue accounts using unique revenue accounting entries. Protocol conversion revenues will be recorded directly in the nonregulated accounts.

19. Ameritech states that its accounting plan provides several techniques to facilitate tracking of both PSN and protocol conversion charges and to insure detailed records which will allow auditing of these procedures. These procedures, Ameritech asserts, will serve as the basis for a comprehensive audit trail which will include detailed accounting procedures, source documents, allocation and loading worksheets and detailed accounting and administrative reports. Corporate managers will utilize this audit trail to perform internal compliance review of the accounting plan, and each operating company will insure that internal audit reviews of protocol conversion accounting procedures are conducted within six months of implementation of the service and annually thereafter.

C. Compliance with the Collocation Conditions

20. As stated in paragraphs 6-9 above, the Commission imposed three conditions on the waiver which allows the BOCs to collocate protocol conversion facilities in their offices.

21. Ameritech has included as Appendix A to its filing a demonstration of compliance with condition one, the treatment of interoffice channels. This appendix contains schematics of the packet switching networks in Ameritech's major metropolitan areas. These schematics diagram the packet switching nodes in the PSNs and the interoffice communications channels linking these nodes. Associated with each diagram is a list of the internodal facilities indicating the type of facility, tariffed rate charged to packet switching service, and the basic tariff reference for each.

22. To meet the requirements of condition two, the calculation of the NURE, Ameritech chose to calculate a uniform, regionwide NURE, predicated on the theoretical inefficiencies inherent in all asynchronous transmission, rather than on the operation on any particular vendor's equipment. The NURE calculated by Ameritech is 8.69 percent, which for ease of administration was increased to 9 percent. The methodology used in the calculation is outlined in Appendix B to Ameritech's filing. Ameritech's rationale for using a single NURE for the region is that the PSNs of the operating companies use a multiplicity of vendors and these differences in equipment provoke different engineering methods and network configurations for each PSN. Additionally, according to Ameritech, the equipment differences are further compounded by different market areas. Accordingly, Ameritech will charge each customer requiring protocol conversion a NURE of 9 percent of the rate of a kilosegment of basic PSN service, applicable to each kilosegment transported. Additionally, protocol conversion users will be charged a "Protocol Conversion Charge" (PCC) which represents additional non-zero costs, i.e., protocol conversion investments and expense-related costs to be recovered from those who obtain protocol conversion. Appendix I of Ameritech's filing describes the PCC calculation.

23. Concerning condition three, pertaining to equal access, Ameritech states that it will offer both dial-up and dedicated access to its PSN services, and that all access methods available in the operating companies' PSNs will be available for use by other vendors of packet switched services. Currently, none of the Ameritech operating companies will offer abbreviated dialing or DOV access, although as now planned, DOV access will be available in the Ameritech region under tariffs separate from PSN tariffs. When these or other connections are offered, Ameritech will make them available to all vendors on an unbundled basis.

24. Ameritech also notes that other packet switched service providers will purchase exchange service for originating and terminating access to and from their networks at tariffed rates. Ameritech will use available intra-office (short-wire) connection cost data to determine dedicated access costs. The savings achieved by these procedures are demonstrated in Appendix A to Ameritech's filing. Ameritech intends, at a later date, to undertake studies necessary to identify the same efficiencies for dial access. Until that time, it will use tariffed rates for costing dial access. Ameritech states that it will notify the Commission of any proposed cost changes regarding short wire connections.

D. Marketing Criteria

25. The criteria associated with a marketing waiver are described in paragraph 10, above. On pp. 14-18 and Appendices C (Accounting Plan) and D (Sales Plan) of its filing, Ameritech describes its compliance.

26. Ameritech states that its accounting and sales plans allow for complete identification and auditing of revenues and expenses associated with PSN service. Revenues will be identified and tracked via USOCs and usage rate elements and applied to the proper regulated and unregulated accounts. For example, any Protocol Conversion Charge revenue will be applied to the unregulated, below-the-line account, and all other PSN revenue will be charged to regulated above-the-line accounts. Salary expenses generated by unseparated marketing personnel, as well as other marketing associated expenses, will be identified via positive time recording and unique job function codes. These costs will be allocated to protocol conversion based on a ratio of revenues associated with protocol conversion traffic to revenues associated with all PSN traffic.

27. Ameritech's proposal for handling customer proprietary information is patterned after that approved by the Bureau for New Jersey Bell.[12] Ameritech will, upon im-

plementation of an approved marketing waiver, notify all customers of their right to have records of their network services barred from review by sales forces marketing protocol conversion services. Customers will also be reminded of their right to have such information released to vendors of their choice. All billing records of interexchange carriers and Value Added Networks (VANs) will be so designated. Personnel within operating companies associated with the sale of protocol conversion will be required, as would affiliated and unaffiliated sales agents, to submit a written authorization from a customer to review these records. All employees would be advised of these guidelines annually, and informed that failure to follow these rules will lead to disciplinary action, including dismissal. Additionally, internal operating company sales force personnel will be required to sign an affidavit acknowledging these guidelines.

28. The third criterion for a protocol conversion joint marketing waiver requires the company to show that it can meet conditions two and three of the collocation waiver requirements. As discussed above, Ameritech has shown how it will, or plans to, comply with these two conditions.

IV. SUMMARY OF PLEADINGS

29. Comments were filed by GTE Telenet Communications Corporation (Telenet), Tymnet, Inc. (Tymnet), and Southwestern Bell Telephone Company (Southwestern Bell). Ameritech filed a reply. These are summarized below.

30. Telenet states that Ameritech's compliance filing generally conforms with the *Protocol Waiver Order*, but that it must be clarified in several respects. Telenet notes that Ameritech appears to have complied with condition one of the *Protocol Waiver Order*, except that it should review the tariffed rates for interoffice facilities on an ongoing basis, rather than annually. With respect to condition two, Telenet observes that while the degree of inefficiency flowing from protocol conversion can be expected to vary from one type of equipment to another, such variations would not appreciably change the NURE factor calculated by Ameritech. Thus, it believes Ameritech has substantially complied with the second condition.

31. Concerning condition three, Telenet notes that although Ameritech does not currently offer DOV service, any action on Ameritech's filing should be conditioned on its making a future demonstration, prior to the institution of DOV access by any of its operating companies, that such equal access is offered on a comparable basis to other vendors of enhanced services. Additionally, Telenet states that with respect to dial access to the PSN, Ameritech should clarify its intentions on whether the seven-digit access number will be utilized for access to an Ameritech packet network in a given LATA, or whether a different seven-digit number will be assigned from each central office in which access is offered. Finally, Telenet notes, while Ameritech has complied "literally" with the shortwire connection requirements of the *Protocol Waiver Order*, it should now amend its filing to reflect the CEI requirements of the *Third Computer Inquiry*.

32. Telenet does not agree, however, that Ameritech has properly developed its PCC. According to Telenet, Ameritech has not explained the rationale for the PCIF upon which the PCC is based, and the sources for the various amounts and factors used in Ameritech's calculations are not identified. Telenet asserts that it appears that the Ameritech companies have not used a consistent methodology, but because of the lack of supporting data, further analysis is impossible.

33. Telenet argues that Ameritech's request for a marketing waiver should be denied because it has not adequately demonstrated that the marketing of protocol conversion must be done by operating company personnel rather than by personnel from the enhanced services subsidiary. Additionally, Telenet states, Ameritech's accounting plan allocates marketing expenses and PSN revenues based on methodologies that are inconsistent, leading to an over-allocation of revenues to basic PSN service and creating a false illusion of profitability. Ameritech's plan for dealing with customer proprietary information, Telenet notes, is adequate, but should be clarified to indicate whether the customer's "rights" to confidentiality are automatic, or whether the customer must specifically request such confidentiality.

34. Tymnet states that although several aspects of Ameritech's plan require clarification or amendment, it has substantially satisfied the collocation conditions of the *Protocol Waiver Order*. Tymnet notes that while it does not object to the two-stage process Ameritech has chosen to follow in demonstrating compliance with the *Protocol Waiver Order*, (see paragraph 1, *supra*), the Bureau should revisit the question of the adequacy and efficacy of Ameritech's proposed compliance plan when it reviews the actual interstate PSN rates and supporting data.

35. Tymnet asserts that Ameritech's proposed method of calculating the NURE percentage is inconsistent with the intent of the *Protocol Waiver Order*, which recognized that various suppliers' packet switching and protocol conversion devices may have different operational characteristics that could justify different magnitudes for the NURE. Tymnet urges that the Bureau direct Ameritech to recalculate the NURE for each of its operating companies, based on the operational characteristics of the equipment that each employs in providing PSN and protocol conversion services.

36. Tymnet acknowledges that Ameritech's proposed accounting plan is adequate in most respects, but states that the Bureau should seek clarification on several points. First, Tymnet believes that Ameritech should clarify how it will identify and allocate PSN administrative costs, and how these costs will be tracked. Second, Tymnet states, Ameritech should clarify whether, and if so how, it will apportion pre-operational PSN engineering, marketing and research and development costs. Third, Tymnet asserts that Ameritech should clarify how it plans to depreciate PSN investment and what depreciation rates it will use. Finally, Tymnet notes, Ameritech should be required to have independent audits performed in conjunction with its PSN and protocol conversion services.

37. Tymnet argues that the Bureau should defer a decision regarding Ameritech's joint marketing request until the Commission has reached a final determination with respect to the safeguards relating to the handling of customer proprietary information being considered in Phase II of the *Third Computer Inquiry*. However, Tymnet states, if the Bureau does decide to permit Ameritech to engage in joint marketing of protocol conversion, it should direct Ameritech to clarify how it intends to allocate sales and advertising revenues to protocol conversion. Essentially, Tymnet argues, the Bureau should take steps to ensure that Ameritech's treatment of PSN costs and revenues of these items are "symmetrical."

38. Southwestern Bell's comments are concerned solely with Ameritech's NURE calculation. It notes that Ameritech correctly states that in addition to operational inefficiencies the Commission also based its NURE requirement on policy grounds. However, Southwestern Bell states that the Commission also indicated that if policy were the sole basis for a differential in price, the differential would not be justifiable. Consequently, Southwestern Bell claims that any BOC waiver applicant who demonstrates that no operational inefficiency exists in its packet switch equipment concerning the provision of asynchronous protocol conversion is not required by the *Protocol Waiver Order* to utilize a NURE.

39. In its reply, Ameritech first asserts that Telenet's concern that the tariffed rates for the interoffice channels (condition one) will only be reviewed on an annual basis is unfounded. On the contrary, Ameritech states, the nonrecurring and monthly charges for any additional facilities to link new or existing packet switching nodes will not be limited to only an annual review and report. The costs of new interoffice facilities will be recorded as they are incurred and thus the expenses of the PSN will include the tariffed rates for all interoffice facilities utilized on a real time basis.

40. In response to Tymnet's concern that the NURE is not appropriately calculated, Ameritech asserts that it meets the full intent of the *Protocol Waiver Order*, and completely satisfies that *Order's* requirements. It also states that recalculating the NURE on an individual company basis would not, as Telenet commented, "appreciably change" the NURE. Finally, Ameritech notes, its NURE is in line with those calculated by other BOCs, and in fact is higher than most. Thus, the problem of a "too-low" NURE is of no concern in this case.

41. Addressing Telenet's concerns about compliance with condition three, Ameritech states that its dial access scheme has no hidden advantages, and all access methods available to Ameritech operating companies will be available to other vendors. Additionally, Ameritech notes, before any Ameritech operating company offers DOV access, it will file its plan with the Commission for review. Finally, Ameritech states that Telenet is seeking to modify the *Protocol Waiver Order* with respect to short-wire connections and CEI, and that the Commission has made it abundantly clear that *Third Computer Inquiry* does not at this time overrule the *Protocol Waiver Order*.

42. Turning to the parties' comments regarding its accounting plan, Ameritech states that none of the comments suggests that Ameritech's accounting plan fails to produce proper below-the-line allocation of protocol conversion costs. Initially, Ameritech disputes Tymnet and Telenet's argument that "asymmetrical" treatment of revenues and expenses will result in an improper ratepayer cross-subsidy. Ameritech states that all revenues from tariffed earnings will be placed in regulated accounts and only revenues from protocol conversion will be placed in unregulated accounts. As much as possible, Ameritech notes, expenses are directly identified and assigned to regulated or unregulated accounts. However, Ameritech continues, in some instances, such as for marketing and advertising expenses, a percentage related to protocol conversion will be allocated to the unregulated accounts. This does not, Ameritech asserts, result in cross-subsidy. Under its accounting plan, Ameritech claims, the worst that can happen would be that too much expense would be borne by the unregulated side and too much revenue by the regulated side.

43. In response to Tymnet's comments regarding administrative and pre-operational expenses and depreciation rates, Ameritech observes that while it is unclear why Tymnet believes these questions are relevant to this proceeding, for the sake of completeness it will address them. Ameritech states that it identifies administrative expenses through the use of generally accepted overhead loading rates applied by the corporate accounting system for capitalization and inter-entity billing purposes, and notes that these treat administrative expenses as homogeneous cost pools with direct assignment of individual cost elements. Specific pre-operational costs, Ameritech notes, have been included in the PSN rate structure whenever possible, while those costs that are more general in nature were included in the annual charge factors based on capital investment and in the general administration and overhead loadings. Finally, Ameritech states, depreciation expense for protocol conversion direct, supporting and overhead investment will be determined for each type of plant using commission prescribed depreciation rates and methodology.

44. As to Telenet's comments concerning the development of the PCC, Ameritech further explains how the PCC and its underlying PCIF were calculated. Ameritech acknowledges that the PCIF does vary among companies, and justifies these variances as a result of the use of different vendors, network deployment strategies based on the equipment configuations and functionality, and costs of the various components of the network. The fact that PCIFs differ, however, according to Ameritech, does not detract from the sound and logical methodologies which underlie their application. Further, Ameritech asserts, the methodology used to develop these factors and the PCCs is quite consistent throughout the operating companies.

45. Ameritech states that the primary, if not sole, reason provided by the commenters for opposing its request for a marketing waiver is that Ameritech has not filed materials which comport to the non-structural safeguards of the *Third Computer Inquiry*. Ameritech asserts that these safeguards are not applicable at this time to conditions established in the *Protocol Waiver Order*. Furthermore, Ameritech states that a careful reading of both Tymnet and Telenet's comments shows that neither claims Ameritech has not met the three requirements for a grant of a marketing wavier.

46. Ameritech states that neither Tymnet nor Telenet complains that Ameritech has failed to identify and allocate below-the-line costs properly. On the contrary, Ameritech notes, their complaints appear to relate solely to the treatment of revenues. And, as discussed in the section of its reply comments on the accounting plan, Ameritech observes that the parties' apprehensions of cross subsidy are unfounded. Ameritech states that Telenet acknowledges that Ameritech's plan for handling proprietary information "is adequate", and that Tymnet recognizes that Ameritech's proposal is essentially the same as that approved for New Jersey Bell. Ameritech notes that the same arguments were made in the recent Bell Atlantic proceeding, but that the Bureau held that until the Commission adopts some alternative approach, the New Jersey Bell procedures would be permitted. Since it complies with the *New Jersey Bell Order*, Ameritech states, the Bureau should grant the waiver.

47. Finally, Ameritech observes that the parties do not object to its two stage approach. See para. 1, *supra*.

V. DISCUSSION

A. Accounting Plan

48. We conclude, as did the parties, that there are no significant problems with Ameritech's accounting plan and cost allocation procedures. The one concern that both Telenet and Tymnet raise is what they perceive to be the "asymmetrical" treatment of revenues and expenses, which will result in improper ratepayer cross-subsidy. We do not share this view. Our analysis shows that all revenues from tariffed earnings are placed in regulated accounts and only revenues from protocol conversion are placed in unregulated accounts. At the same time, virtually all expenses are identified and placed in regulated or unregulated accounts. In a few cases expenses that are not directly identifiable are allocated, based on the ratios described in para. 17, above, to regulated and unregulated accounts. We do not believe these procedures result in cross-subsidies. Under the worst case they would result in an over-allocation of expenses to unregulated accounts and an over-allocation of revenues to regulated accounts.

49. Telenet does not believe Ameritech has properly developed its PCC nor adequately explained the rationale for the PCIF, and states that because of the lack of supporting data, an analysis of these factors is not possible. We agree that Ameritech's initial filing was not adequate on this point. However, in its reply, Ameritech provided a lengthy narrative description of, along with supporting data for, these items. We have reviewed the various amounts and factors upon which the PCC was developed and have examined the rationale for PCIF. We are satisfied with the role these factors play in Ameritech's plan.

50. Based on our review of all the material on Ameritech's accounting plan we find it in accordance with our requirements and conclude it is adequate to segregate the investment, revenues, and expenses associated with protocol conversion services from those of basic packet switching services. We note, however, that Ameritech has stated that this plan is an interim plan pending the outcome of the *Third Computer Inquiry* and the joint and common cost proceeding (Docket 86-111).[13]

B. Compliance with Collocation Conditions

1) Pricing of Inter-Office Channels

51. Our review of Appendix A to Ameritech's Compliance Plan satisfies us that the rates it will charge itself for interoffice channels are identical to those under which these facilities will be made available to others. Telenet notes that while Ameritech appears to have met this condition, the tariffed rates for these circuits should be reviewed on an ongoing basis, rather than annually. In its reply, Ameritech states that it will review the rates on a "real time", or ongoing basis.

2) Network Utilization Rate Element (NURE)

52. On pp. 7-11 and Appendix B of its Compliance Filing, Ameritech describes its method of calculating a theoretical NURE for the four Ameritech operating companies. Telenet believes that Ameritech has substantially complied with this condition. Tymnet argues that Ameritech's NURE calculation is inconsistent with the *Protocol Waiver Order*, and urges the Bureau to order Ameritech to recalculate a NURE for each operating company. We disagree with Tymnet. The Commission explicitly refused to require the BOCs to employ a particular methodology for computing the NURE, leaving to the carriers to propose what they considered to be the appropriate procedure.[14] Ameritech has calculated a NURE for its operating companies that appears reasonable, and has adequately explained its methodology of making this calculation. Thus, we believe Ameritech has met the requirements of condition two.

3) Access to Data Over Voice (DOV)

53. Ameritech has stated that all access methods available in the operating companies' PSNs will be available for use by other vendors of packet switched services. Additionally, Ameritech notes that none of the operating companies will offer abbreviated dialing schemes or DOV access at this time, but that when these are offered they will be available, on an unbundled basis, to all vendors. Accordingly, we will not rule on Ameritech's compliance with this condition at this time; however, when Ameritech offers any abbreviated dial schemes or DOV access, it will be required to demonstrate that it is in compliance with the requirements of this condition.[15] Finally, we do not agree with Telenet that Ameritech should amend its compliance filing with respect to short-wire connections to reflect the CEI requirements of the *Third Computer Inquiry*. As Ameritech has noted, the *Protocol Waiver Order* rejected the notion that short-wire connections should be based on price averaging because such an approach would destroy the economic efficiency of collocation and minimize the benefits to the public. The CEI requirements of the *Third Computer Inquiry* do not overturn the short-wire connection provisions of the *Protocol Waiver Order* .

C. Marketing Criteria

54. The first criterion for a grant of protocol conversion joint marketing waiver is that the company demonstrate that it will identify and allocate to non-regulated operations the cost of marketing protocol conversion. In its proposed accounting plan, Ameritech has described the procedures it will follow to separate the marketing costs associated with protocol conversion from basic packet switching (see paras. 13-19, 26 above). The concerns raised by both Telenet and Tymnet were addressed in the discussion of Ameritech's accounting proposal, para. 48, above, and we will not repeat that discussion here. Thus, we believe that Ameritech's accounting plan is adequate to segregate the marketing costs for protocol conversion from the basic packet switching marketing costs, and conclude that Ameritech has met the first marketing waiver criterion.

55. The second criterion requires that the company explain how it will make marketing information available to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to sell protocol conversion services to BOC basic telephone service subscribers. The procedures Ameritech proposes to use are patterned after those we have approved for New Jersey Bell and the other Bell Atlantic companies.[16] The procedures are also similar to that which the Commission approved when the it relieved AT&T of the separate subsidiary requirement for the provision of CPE.[17] The Commission has, however, invited comment on the possibility that alternative procedures might be adopted with respect to the handling of customer proprietary information by the BOCs.[18] Until it is possible to develop a procedure that will afford greater access to customer information for competitors without intruding upon the rights of customers of transmission services, Amertiech's procedures for customer proprietary information are accepted.

56. The final criterion for a protocol conversion joint marketing waiver requires the company to show how the joint marketing proposal relates to conditions two and

three of the collocation requirements. Ameritech has proposed a NURE of 9 percent and identified the methodolgy of calculating it. Additionally, Ameritech has demonstrated how it will comply with the third collocation condition with respect to equal access, and has submitted that it will demonstrate how it will comply with the DOV access requirement prior to its offering DOV. Based on these demonstrations and assertions, we conclude that Ameritech has satisfied the third criterion for a joint marketing waiver.

D. Other Matters

57. As noted above, Ameritech plans to implement its compliance/waiver request in two stages: the instant pleading involving intraLATA, intrastate service; a later filing for interLATA access tariffs. The parties do not object to this approach, nor do we. However, we remind Ameritech that the determinations reached in this *Memorandum Opinion and Order* relate only to intraLATA, intrastate packet switching services, including protocol conversion. Moreover, at such time that Ameritech files its interstate asccess tariffs for protocol conversion, we will require it to accompany that filing with the appropriate demonstation of compliance with the *Protocol Waiver Order*.

VI. CONCLUSIONS

58. We believe Ameritech's accounting plan and cost allocation procedures adequately satisfy the requirements of the *Protocol Waiver Order* to separate the costs and revenues associated with protocol conversion from those of the basic packet switched services. We also believe that Ameritech's compliance plan satisfies the three collocation conditions of that *Order*. Thus, we accept Ameritech's compliance plan subject to the determinations reached herein.

59. Additionally, we conclude that Ameritech has satisfied the three cirteria for a joint marketing and billing waiver, and subject to the determinations reached herein, we grant Ameritech's request for a joint marketing and billing waiver.

VII. ORDERING CLAUSE

60. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 154(j), that Ameritech's compliance plan IS ACCEPTED and that its joint marketing and billing waiver request IS GRANTED, subject to the conditions set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[2] 47 C.F.R. Sec. 64.702; *see* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff ' d sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F 2d 198 (D.C. Cir 1982), *cert. denied* 461 U.S. 983 (1983).

[3] *Id.*

[4] Section 64.702 (a) of the Commission's rules, 47 C.F.R. Section 64.702 (a) states:

For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

[5] For proposed amendments to the above definition and for other proposals to change our treatment of the enhanced offerings of communications common carriers, see Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), FCC 86-252 (released June 16, 1986); Supplemental Notice of Proposed Rulemaking, FCC 86-253 (released June 16, 1986) (*Computer III Supplmental Notice*).

[6] Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II), FCC 84-561 (released November 28, 1984).

[7] *Protocol Waiver Order*, supra, at 1112.

[8] *Protocol Waiver Order* at 1104.

[9] *Memorandum Opinion and Order*, New Jersey Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II), Mimeo. No. 0426 (released October 24, 1985).

[10] See note 5, *supra*.

[11] *See* Separation of Cost of Regulated Telephone Service (CC Docket 86-111), FCC 86-146 (released April 17, 1986).

[12] *See*, New Jersey Bell Telephone Co., Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II), ENF 84-22, Mimeo No. 1426 (released December 13, 1985) (*New Jersey Bell Order*), Application for Review pending, at paras. 10-13.

[13] *See* Separation of Costs of Regulated Telephone Service (CC Docket 86-111) FCC 86-146 (released April 17, 1986.)

[14] *Protocol Waiver Order, supra*, at 1108.

[15] In ruling on a recent waiver, we discussed guidelines for providing DOV access. *See Memorandum Opinion and Order* , New York Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II), AAD 5-1242, Mimeo No. 6782 (released September II, 1986).

[16] *New Jersey Bell Order, supra*, at para. 13; *Memorandum Opinion and Order*, AAD 5-1296, Mimeo No. 4452 (released May 19, 1986), application for review pending.

[17] *See* Furnishing of Customer Premises Equipment and Enhanced Service by American Telephone and Telegraph Co., 102 FCC 2d 655 (1985), recon. denied, FCC 86-341 (released August 7, 1986).

[18] *See* Notice of Proposed Rulemaking, Furnishingof Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, FCC 86-113 (released March 28, 1986) at paras. 49-50. *See* also *Computer III Suplemental Notice, supra.*, n. 5 at paras. 55-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amended Sales Agency Plans of American Information Technologies Corporation and Operating Companies — ENF 84-49

Amended Sales Agency Plans of NYNEX Operating Companies — ENF 84-51

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 1986 **Released: October 20, 1986**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Ameritech Operating Companies (Ameritech)[1] and the NYNEX Corporation (NYNEX)[2] have filed their respective modified sales agency plans for approval.[3] Comments were filed by the North American Telecommunications Association (NATA) on both revised plans. The Public Service Board of the State of Vermont (Vermont) filed comments on the NYNEX submission. Ameritech and NYNEX both filed reply comments. For the reasons stated below, we will accept Ameritech's and NYNEX's amended sales agency plans and permit them to resume the payment of commissions to their affiliated sales agents on conversions of embedded Centrex accounts through rate stabilization plans. We will, however, withhold approval of the plans subject to a final review of the implementation of these programs.

II. BACKGROUND

2. The Commission found in *American Information Technologies Corp.*, 98 FCC 2d 943 (1984) (hereinafter the *Sales Agency Order*), that it is in principle in the public interest to permit the separate subsidiaries of the BOCs, established under the Commission's *Computer II* rules[4] to market customer premises equipment (CPE), to market the intrastate basic services of their affiliated BOCs as well. That Order permits such arrangements as an exception to the general prohibition on joint marketing by a BOC and its *Computer II* affiliates.[5] The Commission recognized, however, the dangers of anticompetitive abuse and undetected cross-subsidy inherent in such sales agency arrangements. It therefore established certain requirements which would minimize these dangers. Among these was the requirement that unaffiliated entities be permitted to participate in the sales agency program on a nondiscriminatory basis.[6]

3. Subsequent to the release of the *Sales Agency Order*, new or modified sales agency proposals were submitted to the Commission by Ameritech, NYNEX, the BellSouth Corporation, and US West, Inc. In its *Memorandum Opinion and Order*, FCC 85-582 (released November 15, 1985) (here- inafter the *Reconsideration Order*), the Commission reaffirmed its conclusion that sales agency arrangements were in the public interest and acted on the four proposals before it. It found that the BellSouth and US West proposals appeared to comply with the *Sales Agency Order*. However, these programs were in a preliminary stage of implementation, and it was not possible to determine how they would function when they became fully operational. Therefore, the Commission merely accepted these two plans on an interim basis and directed the Chief, Common Carrier Bureau to monitor and review their implementation, delegating to him authority to review and approve these plans when they are fully implemented.[7]

4. In contrast, the Ameritech and NYNEX programs had been in operation for some time, and significant amounts had been paid out in commissions. The Commission found that these two programs, as implemented, were not consistent with the requirements and goals of the *Sales Agency Order*.[8] It found that Ameritech and NYNEX had effectively discriminated against unaffiliated vendors. The procedures both companies established to authorize unaffiliated agents discouraged unaffiliated companies from applying and made it difficult for those who did apply to gain approval as sales agents.[9] Ameritech's and NYNEX's subsidiaries were immediately authorized to act as sales agents, while unaffiliated entities were frequently authorized, if at all, only after a delay.[10] The Commission also found that Ameritech and NYNEX had improperly discriminated in favor of their own subsidiaries with regard to the conversion sales of existing Centrex accounts under rate stabilization programs, the type of sales which generated the great bulk of the commissions paid.[11]

5. Because of the defects in the Ameritech and NYNEX plans and the way in which they were implemented, the Commission refused to approve those plans. It ordered both companies to file new plans within forty-five days,[12] and to cease the payment of commissions to their affiliated sales agents on the conversion sales of existing Centrex accounts under rate stabilization plans pending further order.[13] The revised sales agency plans are now before us for our review.

III. DISCUSSION

A. The Ameritech Plan

6. Ameritech has revised its sales agency plan to conform essentially to the plan submitted by BellSouth and accepted by the Commission in the *Reconsideration Order*. The agent selection process consists of two elements--a determination of the number of sales representatives a given area can support and the selection of agents from among qualified applicants. Ameritech states that agents will be selected from among those who "have a good reputation for integrity, a satisfied customer base, sufficient financial stability to give a realistic expectation of continued operations, a base of marketing and technical expertise, and product lines complimentary to Ameritech network services, including Centrex."[14] Ameritech also states that it will require that its sales agents make the promotion of Ameritech's network services "a major corporate objective." Ameritech has deleted from the contracts it offers its agents a provision (which the Commission specifically found objectionable)[15] relating to the licensing of inventions and improvements made by the agents. Finally, Ameritech states that it will act on all applications then pending within sixty days of the filing of its revised plan and that it will act on subsequent applications within thirty days of the receipt of "all necessary information."

7. We will accept Ameritech's modified sales agency plan, but withhold final approval until the programs are more firmly established. Information which has been submitted to the Bureau[16] indicates that the Ameritech sales

agency programs are still in an early stage of development. The Ameritech operating companies have paid sizable amounts in commissions to unaffiliated entities only since mid-1985. However, Ameritech appears to have changed the nature and scope of its sales agency operations since the *Reconsideration Order*. Illinois Bell has, for instance, accepted twelve unaffiliated agents in 1986, as compared to five in 1984 and 1985. From the information available, it appears that there has been improvement with regard to the period it takes the Ameritech operating companies to process applications, although the thirty day goal Ameritech set for itself has not been met. While some applications have been processed in thirty days or less, the more typical period is from slightly less than two months to two-and-a-half months. There is obviously still room for improvement in this regard. However, we believe that in general the Ameritech operating companies have demonstrated sufficient progress in making the sales agency program available to unaffiliated entities to warrant accepting the revised plan. We also believe that Ameritech has made a sufficient showing that it and its operating companies intend to administer the sales agency program in a non-discriminatory fashion to justify permitting the operating companies to resume the payment of commissions to their affiliated sales agents on the conversions of embedded Centrex accounts through rate stabilization programs.[17]

8. NATA asserts that Ameritech "has not demonstrated that unaffiliated sales agents have been authorized in sufficient numbers to ensure meaningful competition in relevant geographic areas or that it has not rejected qualified agents."[18] NATA proposes an incorrect standard. The Commission did not require that the telephone companies "ensure" competition; it merely required that they "allow a reasonable number of bona fide third party vendors to participate fully in these plans on a nondiscriminatory basis."[19] That aside, NATA's comments consist mainly of positing hypothetical ways in which Ameritech and its affiliates could discriminate under the revised plan. For instance, NATA argues that the selection criteria are so broad as to permit Ameritech to discriminatorily accept or reject a prospective applicant on the basis of whether its reputation was "good" or not, or whether its financial stability was "sufficient". NATA's observation that discrimination could occur under the revised program is well taken. However, NATA has not described any specific instances of the Ameritech operating companies' administrating their sales agency programs in a discriminatory fashion. At this stage in the development of these programs, hypothesizing about what abuses could occur is a profitless exercise. The approach we have adopted will permit these programs to evolve, and if any improper practices develop, NATA or any other interested party has the opportunity to bring them to our attention before the programs are finally approved.

B. The NYNEX Plan

9. NYNEX has made a number of changes in its sales agency plan. It has deleted a requirement that prospective sales agents have five years of relevant business experience and replaced it with a requirement that the applicant show "viable business experience in telecommunications or related markets." NYNEX's general requirements with respect to an applicant's market focus are similar to those in its original plan. An applicant is required to show it has the capability to serve large and medium sized business customers (customers with more than twenty stations) and that it can market a reasonable range of telephone company products and services. NYNEX states that it will request descriptions from the applicant of sales office locations and the number of sales agents and accounts targeted for each area. It has deleted, however, a number of the showings an applicant was required to make under the original plan. Applicants are no longer required to submit a marketing plan to NYNEX. The submission of information about an applicant's sales force, including experience and training requirements and sales force compensation, is no longer required. An estimate of sales volumes for the services involved is no longer being required. Applicants will be required to market only a "reasonable number" of the operating companies' products and services rather than a "full range," as required before, and agents are no longer required to serve "a large portion" of the operating companies' service areas. Finally NYNEX is abandoning the procedure whereby it would compare and rank the prospective applicants and choose only the better qualified (all agents who have applied to date have been approved). NYNEX will still require the prospective sales agent to demonstrate what NYNEX considers to be sufficient marketing resources to support the proposed marketing effort. It has, however, deleted the prior "guideline" that an applicant have an annual sales volume of $20 million. NYNEX also states that it will no longer require non-public information for its evaluation of an applicant's financial condition, but will use instead such public information as corporate financial statements (when publically available) and Dun & Bradstreet reports.

10. NATA raises essentially the same questions with regard to the revised NYNEX plan that it raised with regard to Ameritech's plan–that the plan does not assure that there will be enough agents authorized to provide meaningful competition in each geographic and product market and that it does not assure that agents will be chosen nondiscriminatorily. As with Ameritech, we will accept NYNEX's revised plan, but withhold final approval until the sales agency plans are more fully developed. NYNEX has eliminated the specific requirements which the Commission found were likely to discourage participation. The revised plan is not objectionable on its face, and NATA has not alleged any specific instance of discriminatory behavior. If instances of discriminatory behavior occur, these may be brought to our attention before we take final action on the NYNEX plan. We also believe that NYNEX has made a sufficient good faith showing of an intent to comply with the principles of the *SalesAgency Order* to permit its operating companies to resume the payment of commissions to the affiliated agent on the conversion sales of embedded Centrex accounts through rate stabilization programs.

11. Vermont states in its Comments that while it supports permitting the sale of operating company services by CPE subsidiaries, such arrangements can pose a significant risk that an anti-competitive advantage will be given to the affiliated agent with a concomitant imposition of excessive costs upon monopoly ratepayers. Vermont believes that the best structure for reducing these risks is to have the sales agent as a separate subsidiary directly owned by the operating telephone company. Vermont believes that this arrangement would have the additional benefit of easing the state regulators' task of regulatory oversight. NYNEX uses a single affiliated sales agent which is a subsidiary of the NYNEX Corporation itself, the parent corporation. Vermont states that this arrangement should

be restructured so that the affiliated agents would be subsidiaries of the individual operating companies rather than being a single entity directly owned by NYNEX.

12. The Commission has not considered it necessary or desirable to restrict the Bell Operating Companies' choice of corporate structure in establishing affiliated agents, as long as the requirements of the *Sales Agency Order* are met. It has allowed the companies to select the arrangement which they felt best fits their needs. The issue of the BOC's corporate structure is not properly at issue herein, and we believe it to be beyond this Bureau's delegated authority herein to require the corporate change which Vermont suggests.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. secs. 154(i) and 154(j), That the revised sales agency proposals submitted by the Ameritech Operating Companies and the NYNEX Corporation ARE ACCEPTED, subject to further review by the Chief, Common Carrier Bureau.

14. IT IS FURTHER ORDERED, That the operating companies of the American Information Technologies Corporation and the NYNEX Corporation may resume the payment of commissions to their affiliated sales agents on the conversion of embedded Centrex accounts through rate stabilization plans.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Ameritech Operating Companies are Indiana Bell Telephone Company, Illinois Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] NYNEX filed on behalf of its operating telephone companies, New York Telephone Company and New England Telephone and Telegraph Company.

[3] Authority to act in this matter was delegated to the Chief, Common Carrier Bureau, by the Commission in its *Memorandum Opinion and Order*, FCC 83-582 (released November 15, 1985), paragraph 49.

[4] Section 64.702 of the Commission's Rules and Regulations, 47 C.F.R. Section 64.702.

[5] 98 FCC 2d at 958.

[6] *Id.*

[7] *Reconsideration Order* at para. 17, n.14 and para. 49.

[8] *Reconsideration Order* at para. 17.

[9] *Id.* at para. 19.

[10] *Id.* at para. 20.

[11] *Id.* at para. 21. The nature of the sales agency plans and the defects the Commission found in them, as well as the amounts in commissions paid under the plans, are described in paras. 2-29 of Appendix to the *Reconsideration Order*.

[12] *Id.* at paras. 22 and 41. The Commission directed that Ameritech and NYNEX operate their sales agency programs under the new plans pending our review.

[13] *Id.* at n. 20 and para. 42. The Commission also stated that a separate proceeding would be instituted to determine what should be done with regard to the commissions the Ameritech and NYNEX operating companies had paid to their affiliated sales agents. *Id* . at n. 20 and Appendix A, paras. 16 and 28. By letters dated September 4, 1986, the Bureau has instituted that proceeding.

[14] Ameritech's "Request" at p. 7.

[15] *See Reconsideration Order* at Appendix A, para. 15.

[16] The Bureau requested updated information on the operation of both Ameritech's and NYNEX's sales agency programs on May 22, 1986, and the responses of the companies were provided on June 16, 1986, and June 13, 1986, respectively.

[17] Ameritech has in any event stated ("Request" at p. 2) that it will not pay any such commissions for 1986.

[18] NATA "Comments," at p. i.

[19] *Sales Agency Order*, 98 FCC 2d at 956 (footnote omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE CO.
ITT WORLD COMMUNICATIONS INC.

File No. CSG-86-065-P/L

Application for authority to construct and operate a 4/6 GHz earth station at Vallejo, California for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: October 15, 1986 Released: October 21, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application filed on August 7, 1986, by American Satellite Co. (Amsat) and ITT World Communications Inc. (ITT), requesting authority, pursuant to Title III of the Communications Act of 1934, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international satellite facilities at Vallejo, California, for provision of INTELSAT Business Services (IBS). The application was placed on public notice on August 20, 1986. No comments were received. The applicants have been granted blanket authority to establish and operate channels of communication between the US and various overseas points for provision of IBS.[1]

2. The proposed earth station will consist of a 13 meter antenna connecting with an INTELSAT V satellite in the 6/4 GHz band. The proposed earth station will be constructed at Amsat's national network location. It will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. Amsat's and ITT's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. Both applicants have been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT performance criteria for IBS stations. Amsat and ITT have completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, they may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309, and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-065-P/L IS GRANTED and Amsat and ITT are authorized to construct and operate the proposed earth station at Vallejo, California to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however the applicants should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See AT&T *et al.*, File No. I-T-C-86-035 *et al.*, Mimeo No. 3220 (released March 18, 1985) and ITT World Communications Inc., File No. I-T-C-85-088 (released April 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] See American Satellite Co., File No. CSG-86-048-P/L, Mimeo No. 7154 (released September 30, 1986), and ITT World Communications, Inc., File No. CSG-84-027-P/L, Mimeo No. 5197 (released July 6, 1984).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION

File Nos. CSS-86-006
I-T-C-86-149

Application for authority to participate in an INMARSAT program to lease the L-band capacity of the MARISAT system to provide additional back-up facilities for the INMARSAT system, and for Section 214 authority to provide its currently authorized INMARSAT services via the MARISAT satellites

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 16, 1986 **Released: October 23, 1986**

By the Chief, Common Carrier Bureau:

1. On July 15, 1986, the Communications Satellite Corporation (Comsat) filed an application requesting authority, pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §753(c) (1978) and Title III of the Communications Act of 1934, 47 U.S.C. §§301-399B (1976), to participate in an INMARSAT program to lease the L-band capacity of Comsat's MARISAT system in order to provide additional back-up facilities for the INMARSAT system. Comsat also requested authority, pursuant to Section 214 of the Communications Act, to provide its currently authorized INMARSAT services via the MARISAT satellites in the event INMARSAT places these satellites into operational use.

2. We placed the application on public notice on July 30, 1986. No comments were filed. We hereby grant Comsat's application for the reasons set forth below.

3. On July 10, 1986, the INMARSAT Council approved a proposal to lease the L-band portion of the MARISAT spacecraft.[1] The arrangement would be for a three-year term with options for renewal. The cost of the lease would be $5.4 million, payable in advance. Comsat's share of this cost would be approximately $1.6 million.

4. In requesting that the Commission approve the lease, Comsat points out that the MARISAT system has been closely associated with the operation of INMARSAT from the outset of the latter organization. On February 8, 1982, the Commission authorized Comsat to participate in an INMARSAT program to lease capacity in the three MARISAT satellites for the commencement of the global maritime communications system.[2] INMARSAT subsequently used capacity leased from MARISAT as part of its "Baseline Plus" operational plan[3] and has purchased options to lease MARISAT capacity for standby coverage.

5. Comsat maintains that approval of the proposed lease arrangement is necessary to safeguard the operational integrity and the global availability of the INMARSAT system. Comsat states that the performance of two of INMARSAT's first generation of spacecraft is seriously deficient[4] and many other spacecraft are experiencing service irregularities. Comsat adds that recent launching failures create the substantial possibility that the planned 1988 deployment of INMARSAT's second generation of spacecraft will be delayed, thereby placing a greater burden on the first generation of spacecraft.[5] In procuring the L-band capacity of the MARISAT system, concludes Comsat, INMARSAT is obtaining back-up facilities needed to guarantee continuity of adequate worldwide service for the remainder of this decade.

6. Comsat also claims that the proposed lease arrangement may enable INMARSAT to realize net cost savings from the lease which would enable INMARSAT to terminate the $3.6 million lease it is paying INTELSAT for the severely impaired MCS-C package. Comsat further states that the leased MARISAT capacity could be used for demonstrations of INMARSAT navigational service and to close the AOR/POR coverage gap prior to deploying the second generation of spacecraft.

7. We find the proposed lease arrangement to be in the public interest. In light of the infirmities in various INMARSAT satellites and the possibility of delay in launching the second generation of satellites, the additional capacity made available under the lease appears is needed to ensure that quality maritime services will continue to be provided on a global bases. Further, nothing in the record contradicts Comsat's claim that the lease would be a cost-effective means for INMARSAT to obtain the needed capacity. As we find the proposed arrangement to be in the public interest, we also approve Comsat's request to provide INMARSAT services via the additional capacity leased from MARISAT.

8. Accordingly, IT IS ORDERED that the application of the Communications Satellite Corporation, File Nos. CSS-86-006, I-T-C-86-149, IS GRANTED. Comsat is hereby authorized to participate in an INMARSAT program to lease the L-band capacity of the MARISAT system as specified in its application. Comsat is further authorized, pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. §214 (1976), to provide its currently authorized INMARSAT services via this capacity.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations (the rules), 47 C.F.R. §0.291 (1985), and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within thirty days of the date of public notice of this order (see Section 1.4(b)(2) of the rules).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] The MARISAT system is jointly owned by Comsat General Corporation (a subsidiary of Comsat), RCA Global Communications, Inc., ITT World Communications, Inc. and Western Union International. It is comprised of three satellites, one deployed over each of the major ocean regions--the Atlantic (AOR), the Pacific (POR) and the Indian (IOR).

[2] Communications Satellite Corporation, File No. CSS-81-001-P, FCC No. 82T-2 (released February 8, 1982).

[3] Communications Satellite Corporation, File No. CSS-81-001-P, FCC No. 84-248 (released June 11, 1984).

[4] Comsat refers here to the MARECS-A satellite and to the MCS-C package which is carried on an INTELSAT satellite. According to Comsat, the MARECS-A satellite suffers from EIRP degradation during eclipse periods, attributable to the failure of three solar array sections. Comsat further claims that the INTELSAT satellite on which the MCS-C package is carried suffers from a serious battery problem and the MCS-C itself experiences gain variation and noise malfunctions.

[5] On January 7, 1986, the Commission granted Comsat's application to participate in the procurement of the first three satellites in the INMARSAT second generation satellite series. INMARSAT Second Generation System, File No. CSS-85-002, FCC No. 85-666 (released January 7, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: October 23, 1986

PUBLIC NOTICE

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION/EXTENSION OF TIME TO FILE REPLY COMMENTS TO SUGGESTED CHANGES TO SECTIONS 22.117 AND 22.505 OF THE COMMISSION'S RULES IN RM-5555

On October 14, 1986, The Paging Division of Telocator Network of America filed a Motion for Extension of Time to file a Consolidated Reply to Comments. No objections to the extension have been received. In view of the technical issues raised in the comments the requested 15-day extension seems reasonable and in the public interest. Therefore an extension of time to file Reply Comments is granted until November 5, 1986.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-391

Amendment of Section 73.202(b), RM-5354
Table of Allotments,
FM Broadcast Stations.
(Windsor, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 3, 1986 Released: October 23, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Communi-Com, Inc., ("petitioner") seeking the allotment of FM Channel 299A to Windsor, Virginia, as that community's first FM service. Petitioner states an intention to apply for the channel, if allotted.

2. The channel can be allotted in compliance with the Commission's minimum spacing requirements with a site restriction of 2.9 kilometers (1.8 miles) east of the community to avoid a co-channel allotment at Alberta, Virginia.

3. In view of the fact that the proposed allotment could provide a first FM service to Windsor, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the following community:

	Channel No.	
City	Present	Proposed
Windsor, Virginia	—	299A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before December 15, 1986 and reply comments on or before December 30,1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John A. Hill, President
Communi-Com, Inc.
1707 Winding Way
Richmond, VA 23235
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings , to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b), 73. 504 and 73. 606(b) of the Commission's Rules,* 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau (202) 634-6530. However, members of the Public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-399

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Dickson,Tennessee)	RM-5504

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1986 Released: October 24, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by American Communications, Inc. ("petitioner"), licensee of FM Station WDKN-FM, Channel 272A, Dickson, Tennessee, proposing tha substitution of Channel 273C2 for channel 272A at Dickson and modification of its license to specify operation on Channel 273C2. Petitioner submitted information in support of the proposal.

2. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.3 kilometers (9.5 miles) northwest of Dickson in order to avoid short spacings to Station WWWB-FM, Channel 273, Jasper, Alabama and Station WYCQ(FM), Channel 275, Shelbyville, Tennessee.

3. In accordance with our established policy, we shall propose to modify the license of Station WDKN-FM to specify operation on Channel 273C2. Pursuant to Section 1.420(g) we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel. *See Modification of FM Broadcast Licenses to Higher Class Co - channel or Adjacent Channels*, MM Docket No. 85-313, 51 FR 20290, June 4, 1986.

4. Accordingly, in order to provide Dickson with its first wide coverage FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Dickson, Tennessee	272A	273C2

5. The Commission s authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before December 15, 1986, and reply comments on or before December 30, 1986, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John L. Tierney, Esquire
Ann Bavender, Esquire
Tierney & Swift
1020 19th Street, N.W.
Suite 200
Washington, D. C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings. to amend the FM Table of Allotments, Section 73.202(b) of the Commissions Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202(b). 73. 504 and 73. 606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a Pending rule making, other than comments officially filed at the Commission, or oral Presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U S WEST, INC. ENF 85-32
Capitalization Plan for
U S WEST INFORMATION SYSTEMS, Inc.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY ENF 85-27

NORTHWESTERN BELL TELEPHONE COMPANY ENF 85-28

PACIFIC NORTHWEST BELL TELEPHONE COMPANY ENF 85-29

Plans for Sharing Administrative Services

MEMORANDUM OPINION AND ORDER

Adopted: October 20, 1986 Released: October 23, 1986

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. U S West, Inc. has filed an initial Capitalization Plan for its wholly owned *Computer II* subsidiary, U S West Information Systems, Inc. (USWIS), and three shared administrative services plans[1]. These plans were filed pursuant to requirements set forth by the Commission in the *BOC Capitalization Plan Order*.[2] All four of these plans describe how the separated organizations providing customer premises equipment (CPE) and enhanced services will share administrative services with the other entities within the U S West Corporation. We will, therefore, address all four plans in this *Order*.

2. We have reviewed the Capitalization Plan and Sharing Plans to determine if they are in compliance with the requirements of the *Second Computer Inquiry*.[3] In addition, we have reviewed the comments and reply comments of interested parties regarding the proposed plans. Based on these reviews, we approve the Capitalization Plan and accept the Sharing Plans on an interim basis, subject to the Commission's determinations in the *Third Computer Inquiry*,[4] the proceeding to examine the need for structural separation for the BOCs' provision of CPE,[5] and the proceeding to establish guidelines for the allocation of costs between regulated and unregulated activities.[6]

II. *BACKGROUND*

A. Computer II Procedures

1. In the *Second Computer Inquiry* , *supra*, the Commission concluded that AT&T's CPE and enhanced services operations should be conducted through an entity that is structurally separated from its regulated operations. Section 64.702 of the Commission's Rules (*The Computer II Rules*) establishes the requirements for structural separation, including a requirement that the Commission must approve the manner in which the separate corporation is capitalized and any modifications to the approved Capitalization Plan. In the *BOC Separation Order*,[7] the Commission applied the *Computer II* rules to the BOCs and approved in principle the policy that the BOCs should be allowed to share certain administrative services with their separate subsidiaries. It also required the BOCs to file plans describing the methods of accounting for those services. U S West petitioned for reconsideration of the *BOC Separation Order*, objecting to the restrictions the Commission placed on the interaction between itself, its separate CPE subsidiary, and its operating telephone companies. On June 1, 1984, the Commission issued an order denying reconsideration of the *BOC Separation Order*, and affirming its conclusion that the Regional Holding Companies' (RHCs') *Computer II* subsidiaries are subject to its jurisdiction. Pending further review, the BOCs were allowed to share, on an interim basis, the same services AT&T had been permitted to share[8] as long as the nonregulated operations were charged with all costs of providing those services. Most BOCs or their RHC parents filed capitalization plans and plans for sharing administrative services on February 28, 1984. U S West did not file such a plan for its directly held *Computer II* subsidiary. Instead, it challenged the Commission's authority to require the filing of capitalization plans for *Computer II* subsidiaries which are owned directly by the regional holding company.[9]

B. Permanent Capitalization Plans

4. In the *BOC Capitalization Plan Order*, the Commission ordered U S West to file a final capitalization plan for its directly held *Computer II* subsidiary. In that *Order* the Commission also authorized capitalization of the U S West Operating Telephone Companies' *Computer II* subsidiaries in the amount of $65.8 million. Finally, the Commission required that the BOCs file updated shared administrative services plans to reflect changes in the shared administrative services necessitated by corporate reorganizations. On March 21, 1985, U S West filed the revised Sharing Plans and a Capitalization Plan requesting maximum capitalization of $240 million for USWIS. U S West also requested capitalization of Advanced Paging Services, Inc. (APS) in the amount of $4.8 million in order to allow APS to participate fully in the paging service, paging CPE, and cellular markets. The Commission approved the APS capitalization request on July 5, 1985.[10]

C. Other Commission Actions

5. While reviewing these Plans, Commission staff concluded that more data was needed to evaluate the Plans. U S West provided responses to staff information requests of November 22, 1985 and July 28, 1986 on December 13, 1985 and August 22, 1986, respectively.

D. U S West Organization and Current Capitalization

6. U S West, Inc. provides telephone service through three operating telephone companies: Northwestern Bell Telephone Company (NWB), The Mountain States Telephone and Telegraph Company (MTN), and Pacific Northwest Bell Telephone Company (PNB). Each operating telephone company provides service in a separate area of the U S West Region. In March 1985 U S West provided CPE through four subsidiaries: (1) COMM+, which was wholly owned by PNB; (2) Northwestern Bell Information Technologies, which was wholly owned by Northwestern Bell Holding Company; (3) Mountain Bell Technologies, which was wholly owned by Mountain Bell Holding Company; and (4) U S West Services, Inc. which

was wholly owned by U S West, Inc. On August 1, 1985, U S West reorganized its corporate structure. In its August 26, 1986 filing U S West describes its current corporate structure as follows: COMM+, a wholly owned subsidiary of PNB, markets Network Channel Terminating Equipment (NCTE). USWIS, a wholly owned subsidiary of U S West, Inc., markets business communications products and services nationally. These include the provision of installation, maintenance, and service of telecommunications systems and premises wiring as well as a full range of communications management activities, such as engineering and consulting. U S West Enterprises, Inc. (formerly Northwestern Bell Information Technologies, Inc.) is also a wholly owned subsidiary of U S West, Inc. This company provides enhanced voice and data services, consulting, CPE and non-telecommunications services. Mountain Bell Technologies, Inc. is now a shell corporation which is wholly owned by U S West, and the operations of APS have been transferred to U S West's cellular radio subsidiary, NewVector, Inc.

7. U S West's plans list the various services provided to each U S West CPE and enhanced services subsidiary and the allocation methods used to identify the cost associated with providing these services to the fully separated subsidiaries. In its August 22, 1986 response to our request for additional information, U S West provided current information concerning shared administrative services, and also provided extensive detail concerning the August 1, 1985 reorganization of its *ComputerII* activities. To date, total capitalization of all U S West CPE and enhanced services subsidiaries amounts to $210.8 million for U S West Information Systems, Inc.; $27.6 million for U S West Enterprises; $9.3 million for COMM+; and $4.8 million for APS.

III. SUMMARY OF PLEADINGS AND DISCUSSION

8. The North American Telecommunications Association (NATA) filed comments on the U S West capitalization plan, and U S West filed a reply. Comments regarding the Sharing Plans were received from the Association of Data Processing Services Organizations, Inc. (ADAPSO), the Independent Data Communications Manufacturers Association, Inc. (IDCMA), and NATA. Reply comments were filed by NATA, International Business Machines Corporation (IBM) and U S West.

A. U S West's Capitalization Plan for U S West Information Systems, Inc.

9. NATA states that U S West's capitalization plan is incomplete and that it had been filed in a piecemeal manner. Therefore, it argues that it was difficult for interested parties to comment. In reply U S West states that it filed its complete plan as an appendix to the March 15, 1985 Motion for Stay in this proceeding. It further argues that inasmuch as NATA filed an opposition to that Motion, NATA had the complete filing in one place. We agree with U S West that its Motion for Stay of the *BOC Capitalization Plan Order* provided data from previous filings in one place for interested parties to review. Therefore, NATA had sufficient opportunity to comment.

10. NATA also suggests that the Commission refrain from approving capitalization of U S West's *Computer II* subsidiaries until U S West provides a projected date for USWIS's financial independence. However, U S West did, in fact, provide Commission staff with all of the necessary financial information, including its proposed timing of USWIS's financial independence, in its August 26, 1986 response to our July, 1986 request.

11. NATA suggests that U S West file reports concerning the operation and capitalization of all of its nonregulated subsidiaries. We believe that this suggestion is inappropriate. The *BOC Separation Order* and the *BOC Capitalization Plan Order* are concerned solely with the operation and capitalization of the BOCs' *Computer II* subsidiaries.

12. Based on our review of the U S West Capitalization Plan, we believe that U S West is meeting the conditions of the various *Computer II* orders and is assuring that cross-subsidization of nonregulated operations by its regulated operations will not occur. We will continue to monitor the activities of USWIS and will carefully review any request for additional capitalization of USWIS.

B. U S West Updated Shared Administrative Services Plans

13. ADAPSO and IDCMA reiterate prior comments maintaining that the Sharing Plans contain few changes from the permanent Capitalization Plans which had been filed June 30, 1984. ADAPSO and IDCMA object to these plans, stating that the deficiencies of the permanent Capitalization Plans are still evident in the updated filings. ADAPSO states that we should require each RBOC to cease all sharing until such time as these perceived deficiencies are eliminated.

14. Although the Sharing Plans are similar to those filed in the Capitalization Plans on June 31, 1984, the *BOC Capitalization Plan Order* prescribed the changes the Commission required in U S West's prior filings concerning the sharing of administrative services. Such changes are those which the Commission deems necessary for U S West's compliance with the *BOC Separation Order*. We have reviewed these plans and have determined that U S West has made the required changes as prescribed in the *BOC Capitalization Plan Order*. U S West is in compliance with that *Order*.

15. NATA and IBM voice reservations concerning the cost allocations for provision of shared administrative services in the Sharing Plans. IBM states that it is imperative that the Commission develop detailed accounting procedures to assign or allocate costs properly to the cost causative entity. NATA also believes that it is necessary that the Commission require adherence to standardized procedures in order to provide effective oversight of the accounting practices for costing the shared administrative services of each of the BOCs.

16. We agree with the commenting parties that the development of detailed accounting procedures for the proper allocation of costs common to regulated and nonregulated entities are necessary when services are shared between affiliates. The Commission is currently developing standardized accounting practices and procedures for costing regulated and nonregulated operations in the proceeding initiated by the *Joint Cost NPRM*. In the interim we will continue to monitor U S West's accounting procedures for consistency with Commission policy.

IV. CONCLUSION

17. We have considered U S West's Capitalization Plan for USWIS and its plans for sharing Administrative Services. We conclude that the plans submitted by U S West are acceptable, subject to the determinations set forth herein.

18. We have considered the concerns expressed by the commenting parties regarding the Sharing Plans of U S West's Operating Telephone Companies. We have concluded that these concerns are insufficient to warrant rejection of the Plans. It is not our purpose in this

proceeding to relitigate policy issues which were resolved in the *BOC Separation Order*. Rather, we review the carriers' implementation of those policies to insure that the possible adverse effects are minimized. Based on this review we believe that U S West has made a genuine effort to assure that it is meeting the conditions of the various *Computer II* orders and to assure that cross-subsidization will not occur.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended. 47 U. S. C., subsections 154(i) and 154(j), that the Shared Administrative Services Plans submitted by U S West ARE ACCEPTED.

20. IT IS FURTHER ORDERED that the Final Capitalization Plan for U S West Information Systems, Inc. filed March 21, 1985, as supplemented on August 22, 1986, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Each US West telephone company filed a sharing plan. We will refer to the plans collectively as the Sharing Plans.

[2] In the Matter of American Information Technologies, Inc., BellSouth, Bell Atlantic, NYNEX, Pacific Telesis, Southwestern Bell, US West, Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, ENF Nos. 84-25, *et. al.*, 102 FCC 2d 1089 (1985) (*BOC Capitalization Plan Order*), *jurisdictional holding aff'd sub nom.* North American Telecommunications Ass'n v. FCC, 772 F. 2d 1282 (7th Cir. 1985).

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations, (*Third Computer Inquiry*), FCC 86-252 (released June 16, 1986), Supplemental Notice of Proposed Rulemaking, FCC 86-253 (released June 16, 1986).

[5] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, FCC 86-113 (released March 28, 1986), 51 Fed. Reg. 11948 (April 8, 1986).

[6] Separation of Costs of Regulated Telephone Service (CC Docket 86-111), FCC 86-146 (released April 17, 1986) (*Joint Cost NPRM*), 51 Fed. Reg. 16178 (May 1, 1986).

[7] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984) (*BOC Separation Order*), *reconsideration*, FCC 84-252 (released June 1, 1984), *aff'd sub nom.* Illinois Bell Telephone Company v. FCC, 740 F.2d 465 (7th Cir. 1984), *decision on reconsideration aff'd sub nom.* North American Telecommunications Association v. FCC, 772 F. 2d 1282 (7th Cir. 1985).

[8] In the Matter of American Telephone and Telegraph Company Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology (*General Departments Order*), 90 FCC 2d 184, (released June 16, 1982); In the Matter of American Telephone and Telegraph Company Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology (*Shared Services Order*), 92 FCC 2d 676, (released December 13, 1982). *reconsideration denied*, FCC 83-355, (released July 29, 1983).

[9] On February 15, 1985 U S West petitioned the U. S. Court of Appeals, challenging the Commission's jurisdiction over CPE and enhanced services subsidiaries which are wholly owned by the RHC. On March 15, 1985, U S West filed a Motion for Stay of th *e BOC Capitalization Plan Order* with the Commission. The Commission denied the Motion for Stay In the Matter of US West, Inc. ENF 84-31 (released March 20, 1985). In North American Telecommunications Ass'n v. FCC, 772 F. 2d 1282 (7th Cir. 1985) the Court upheld the Commission's jurisdiction.

[10] In the Matter of Advanced Paging Services, Inc., Capitalization Plan for the Furnishing of Paging Services, Paging Customer Premises Equipment and Cellular Customer Premises Equipment, ENF No. 84-31 (released July 5, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Bell Atlantic Telephone Companies
Transmittal Nos. 100, 108, 109, 114 and 116
Tariff F.C.C. No. 1

ORDER

Adopted: October 20, 1986; Released: October 23, 1986

By the Chief, Common Carrier Bureau:

1. The above captioned tariff revisions were filed by the Bell Atlantic Telephone Companies (Bell Atlantic) on August 29, 1986 and became effective on October 18, 1986. By Transmittal No. 100, Bell Atlantic proposes mid-course revisions reducing switched access revenues for the four Chesapeake and Potomac Companies (C&P),[1] Bell of Pennslyvania and New Jersey Bell by approximately 9 percent, and reducing special access rates for C&P of Maryland and Virginia by approximately 7.5 percent and 11 percent, respectively.

2. Also by this transmittal, Bell Atlantic proposes to calculate switched and special access rates for the four C&P companies on a geographically aggregated basis. As described by Bell Atlantic, the C&P aggregate rates were developed in a two step process. First, as part of the mid-course corrective filing, rate adjustment factors were applied to switched access rates in all four C&P jurisdictions and to special access rates in Maryland and Virginia. According to Bell Atlantic, these mid-course revisions are designed to permit companies overearning on switched and special access to retarget rates prospectively to achieve 12.75 percent returns. Next, Bell Atlantic developed aggregated C&P rates by applying weighting factors to switched and special access rates in each Part 69 category for each jurisdiction.[2] The resulting weighted rates were added together to produce C&P aggregate rates.

3. In petitions filed September 16, 1986, Capital Cities/ABC Inc., CBS Inc. and the National Broadcasting Company, Inc. (jointly referred to as the Networks) and the General Services Administration (GSA)[3] ask the Commission to reject or suspend and investigate the rate aggregation plan proposed by Bell Atlantic in Transmittal No. 100. While the Networks do not generally oppose Bell Atlantic's proposal to aggregate television service rates for the four C&P jurisdictions, they argue that Bell Atlantic's methodology ignores the disproportionate concentration of special access revenues derived from television services offered in the District of Columbia.[4] Thus, they argue, Bell Atlantic's aggregation plan is based on a weighting procedure that overlooks the distribution of television service demand and revenues among the C&P regions and, as a result, disproportionately increases special access rates in the District of Columbia.[5] The Networks assert that Bell Atlantic should be required to calculate the rates in a "revenue neutral manner" that derives required revenues and rates for each special access service.

4. GSA objects to Bell Atlantic's plan to aggregate C&P rates. According to GSA, the proposed rate aggregation plan would stimulate uneconomic bypass in low-cost areas and deter economic bypass in high-cost regions. Moreover, it argues, the plan would result in sharply increased special access rates for the District of Columbia, causing Bell Atlantic to exceed authorized earnings in the District, and also causing unnecessary rate churn.

5. In reply Bell Atlantic argues that the Commission's CC Docket No. 84-800 specifically authorizes carriers to propose consolidated rates.[6] In response to the Networks' objections, Bell Atlantic maintains that the methodology it used to average rates among the four C&P companies was reasonable. Moreover, it argues, "no reasonable method for consolidating video service rates would avoid a rate increase to the Networks."[7]

6. By Transmittal No. 116, filed October 16, 1986 pursuant to Special Permission No. 86-758, Bell Atlantic further revised its proposed aggregated video service special access rates. According to Bell Atlantic, as further revised, "the proposed revised C&P Video Service rates are based on the relationship of three months of video billing data for each jurisdiction to the total C&P three month video billing data."[8] Bell Atlantic maintains that "[t]he effect of the revision is an overall 3% revenue reduction in video services."[9]

7. The Common Carrier Bureau has reviewed the tariff, the petitions, Bell Atlantic's reply and the subsequent transmittal filed by Bell Atlantic. We find that the petitioners have failed to demonstrate any violation of the Communications Act or the rules of the Commission that would make the proposed tariff revisions patently unlawful and thus warrant rejection. The objections expressed by the Networks are not applicable to the revised transmittal and the GSA petition does not present any question with respect to the lawfulness of the tariff that warrants investigation.

8. IT IS THEREFORE ORDERED that the petitions filed against Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 100 by Capital Cities/ABC Inc., CBS Inc. and the National Broadcasting Company, Inc. and by the General Services Administration ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] These companies include C&P of the District of Columbia, Maryland, Virginia and West Virginia.

[2] The weighting factors are based on the relationship of prospective revenue requirements in each C&P jurisdiction to the total C&P prospective revenue requirements for October-December 1986.

[3] GSA filed its petition on behalf of the Federal Executive Agencies.

[4] *See* Network Comments at 7.

[5] The Networks do not object to the mid-course rate revisions proposed by Bell Atlantic inasmuch as these revisions do not affect special access rates in the District of Columbia. They argue, however, that the aggregated C&P special access video service rates proposed by Transmittal No. 100 are significantly higher than those currently effective for the District. *See* Network Comments at 7-8.

[6] Bell Atlantic Reply at 2.

[7] *Id.* at 5.
[8] Transmittal No. 116 at 1.
[9] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

BINGHAMTON
CELLTELCO File No. 14535-CL-P-122-A-86

For authority to construct a
cellular system in the Domestic
Public Cellular Radio
Telecommunications Service on
Frequency Block A in the
Binghamton, New York MSA

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1986; Released: October 24, 1986

By the Common Carrier Bureau:

1. Northern Illinois Cellular Communications, Inc. (NICCI) has filed a petition to deny the above-referenced application of Binghamton Celltelco (Cellco). Cellco opposes the petition.[1] In its petition NICCI argues that Cellco's 39 dbu contours do not cover a minimum of 75% of its proposed CGSA as required by Section 22.903(a) of the Commission's rules. In addition, NICCI argues that the bank letter submitted by Cellco does not constitute a firm financial commitment because it is contingent upon stockholders' guarantees that may or may not be provided.

2. NICCI's claim that Cellco fails to meet the requirements of Section 22.903(a) of the Commission's rules concerning minimum coverage is in error. A review of the application reveals that Cellco's proposed 39 dbu contours covers the required 75% of the CGSA. Moreover, we find that Cellco has also complied with the Commission's rules concerning financial qualifications. Its financial amendment, filed on June 30, 1986, included a commitment letter from the Bank of Mobile indicating that it will loan Cellco up to $2.3 million to finance construction and first year operation of the Binghamton Cellular system. The letter also outlines the terms and conditions of the loan. In light of the foregoing we find that Cellco has demonstrated a firm financial commitment. Finally, NICCI's concern as to the availability of the funds due to the guarantee provision is moot. The Bank by way of clarification has indicated that the sole guarantee required is that of John R. Miller Jr. As petitioner acknowledges Mr. Miller's guarantee has been provided.

3. Based on the foregoing, after careful review of the application and associated pleading, we find Cellco to be legally, technically, and otherwise qualified to be a Commission licensee.

4. Accordingly IT IS ORDERED that, the application filed by Binghamton Celltelco, File No. 14535-CL-122-A-86, IS GRANTED conditioned upon Cellco's obtaining the proper antenna structure clearances. The authorization does not include the right to any interference protection in any areas outside the Binghamton MSA and is further conditioned upon Cellco's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

5. IT IS FURTHER ORDERED that, the petition to deny filed by Northern Illinois Cellular Communications, Inc. IS DENIED.

6. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. See Section 1.4(b)(2).

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] applicant selected in the non-wireline cellular lottery for the Binghamton, New York MSA. Miller amended its application to substitute Cellco as the applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ANGELES BROADCASTING NETWORK
San Bernardino, California
MM DOCKET NO. 83-1001
File No. BPCTI-830418KG

MARANATHA BROADCASTING CO., INC
San Bernardino, California
MM DOCKET NO. 83-1003
File No. BPCTI-830419KG

For Interim Authority to Operate the Facilities of Former Station KHOF-TV Channel 30, San Bernardino, California

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1986; Released: October 24, 1986

By the Commission:

1. Before the Commission are: (1) Petitions for Reconsideration filed November 29, 1985 by Melana James, December 3 by Bradley Dale Tubin and United States Congressman Mervyn Dymally, and December 9 by Angeles Broadcasting Network (Angeles); (2) an Opposition thereto filed December 16 by Maranatha Broadcasting Co., Inc. (Maranatha); (3) a Reply filed December 23 by Angeles; (4) a Supplement [to Petition for Reconsideration] filed March 3, 1986 by Angeles, Oppositions thereto filed April 1 and May 2 by Maranatha, and Replies filed April 11, 14, and 24, June 2, and July 21 by Angeles and an Opposition thereto filed June 12 by Maranatha; (5) a Petition to Vacate Grant, Reopen the Record and Enlarge the Issues filed December 20, 1985 by Angeles, an Opposition thereto filed April 1, 1986 by Maranatha and a Reply filed April 11 by Angeles; (6) a Petition for Leave to Intervene filed January 2 by Melana James; and (7) a Motion to Dismiss [Maranatha's Application] filed February 28 by Angeles, an Opposition thereto filed March 12 by Maranatha, and a Reply filed March 18 by Angeles.

I. BACKGROUND

2. These proceedings were designated to select an interim operator to broadcast on Channel 30 at San Bernardino, California pending the selection of a permanent replacement for deleted Station KHOF-TV. [1] Channel 30 became available upon the dismissal of Faith Center, Inc.'s (Faith) application for renewal of KHOF-TV. [2] To expedite matters, the Commission sought to avoid recourse to a full evidentiary hearing before an Administrative Law Judge. Instead, the Commission directed the parties to make documentary submissions to and present oral argument before the Review Board.

3. On November 26, 1984, the Commission upheld a Review Board Decision granting Angeles' application and denying Maranatha's. [3] Angeles received a dispositive preference for integration of ownership into management. Both Angeles and Maranatha are non-profit corporations controlled by a board of directors, and each proposed to integrate all of their directors into management full time. Angeles proposed to integrate Rev. Gerald G. Barnard as general manager, Rev. Glen A. Chambers as station manager, and Earlean Anthony as business manager. Maranatha proposed to integrate Timothy D. Waisanen as general manager, Robert Billman as station manager, William Welty as business manager, and Vera E. Waisanen as sales manager and director of personnel. Thus, each applicant received 100% quantitative integration credit, and the case ultimately turned on the qualitative aspects of the integration proposals. As to the latter enhancements, the applicants were deemed equivalent in broadcast experience and local residence. Angeles, however, received a decisive minority and female ownership preference based on the integration of Anthony, who is a black woman and 33% owner. The Commission held that this advantage outweighed Maranatha's 25% credit for female ownership.

4. In reaching this result the Commission rejected allegations by Maranatha that Rev. Barnard could not be expected to effectuate his integration proposal because of outside responsibilities. After requesting further submissions on this point, [4] the Commission concluded that Rev. Barnard had adequately explained how he would accomodate his outside responsibilities. Maranatha appealed the Commission's action to the United States Court of Appeals for the District of Columbia Circuit on December 21, 1984. [5]

5. Angeles commenced program test operations on January 20, 1985, and on February 6, filed a license application using the call letters KAGL-TV. On April 8, Angeles filed a statement reciting that Rev. Barnard had "been in disagreement" with Rev. Chambers and Anthony, and that on February 15, Rev. Barnard had resigned as Angeles' president. [6] The statement further reported that at an Angeles' board meeting on February 25, Anthony and Rev. Chambers voted to accept Rev. Barnard's resignation as director, president, and general manager and to elect Rev. Chambers president. [7] According to the statement, Rev. Barnard does not agree that he has resigned or been removed from his position with Angeles.

6. Because of these changes in core circumstances, the Commission requested the court to remand the proceeding for consideration of Angeles' integration proposal and of Angeles' apparent failure to report recent changes on a timely basis. On June 10, 1985, the court granted the Commission's unopposed motion and remanded the case.

7. Following remand, on November 8, 1985, the Commission reconsidered its prior action, granted Maranatha's application, and denied Angeles'. [8] The Commission held that Angeles could receive no credit for postdecisional substitution of Beverly Chambers for Rev. Barnard. Thus, the Commission reduced the integration credit accorded Angeles from 100% to 66 2/3%, significantly less than the 100% credit accorded Maranatha. Because of the disparity in quantitative integration, qualitative differences between the two proposals no longer assumed decisional proportions. Having concluded that Maranatha should prevail over Angeles based on its integration proposal, the Commission did not address the question of whether Angeles violated the Commission's reporting Rules with respect to the departure of Rev. Barnard.

8. In its reconsideration Order, the Commission required Angeles to terminate operation of KAGL-TV within 60 days. However, since Maranatha was unprepared to commence its own operation immediately, the Commission subsequently stayed the termination provision to pre-

vent a disruption of service to the public, and Angeles is currently authorized to continue operation pending further action by the Commission. [9]

II. CHANGED CIRCUMSTANCES

9. As the preceding discussion indicates, what was originally intended as an expedited comparison of the applicants has become a protracted and complex proceeding. [10] Indeed, with the Commission's reconsideration have come additional changed circumstances and fresh allegations. Angeles and three nonparties seek reconsideration of the Commission's reconsideration Order. Angeles also seeks to reopen the record and enlarge the issues to explore Maranatha's basic qualifications. Questions concerning Maranatha's integration proposal have also arisen. Maranatha responds with charges relating to Angeles' qualifications. These new matters require yet another reconsideration of the Commission's prior actions.

10. Our further consideration begins with a matter of critical importance. In a letter dated January 21, 1986, Timothy D. and Vera E. Waisanen, two of Maranatha's four directors, notified the Commission that they had resigned from Maranatha on January 6. The Waisanens were Maranatha's proposed general manager and sales manager/director of personnel, respectively. The Waisanens state that it has become impossible for them to work with Maranatha's other directors. On June 19, 1986, Maranatha notified the Commission that Robert Billman had resigned as a director. [11] Maranatha does not dispute the significance of these actions. As was the case with Rev. Barnard's withdrawal from Angeles, the postdecisional withdrawal of the Waisanens and Billman reduces Maranatha's credit, here from 100% to 25%. Angeles' 66 2/3% to 25% quantitative integration advantage therefore gives it a decisive comparative advantage over Maranatha.

11. The foregoing change in Maranatha's comparative position warrants the dismissal of various Petitions for Reconsideration. These Petitions challenge the Commission's prior action preferring Maranatha over Angeles on comparative grounds. [12] They have thus been rendered moot by the action herein. [13] To the extent that the Supplement to Angeles' Petition relies on the reduction of Maranatha's integration credit, it will be granted.

12. The remaining allegations before the Commission concern the respective basic qualifications of Angeles and Maranatha. [14] Because of its comparative inferiority, Maranatha's qualifications are relevant only if Angeles is found unqualified. For the reasons which follow, we find no need for further proceedings concerning Angeles' basic qualifications. Accordingly, we will dismiss Angeles' Petition which deals with Maranatha's basic qualifications, and we will grant Angeles' application.

III. ANGELES' BASIC QUALIFICATIONS

13. We must first consider the question mooted in our prior reconsideration Order: whether Angeles violated the Commission's reporting Rules with regard to Rev. Barnard's withdrawal from Angeles. Section 1.65 of the Commission's Rules requires applicants to report matters of potential decisional significance within 30 days of occurrence. As previously mentioned, Angeles reported the departure of Rev. Barnard on April 8, 1985, which according to Angeles, was 52 days after he gave his oral resignation and 42 days after his resignation was accepted by Angeles' board of directors. In view of Angeles' voluntary disclosure on April 8, we discern no motive to deceive in the brief delay in reporting this matter and no prejudice to other parties. No justification exists for adding an issue based on these facts. [15]

14. Maranatha, however, now asserts that Rev. Barnard's resignation actually occurred prior to the dates claimed by Angeles. In support of this contention, Maranatha proffers statements by Lloyd Watson and Dave Williams, individuals who are suing Angeles for breach of contract. According to these statements Rev. Barnard told Watson and Williams as early as January 15, before Angeles commenced interim operation, that Angeles' other directors had "taken action" to remove him. Maranatha also notes a statement previously submitted by Rev. Barnard in this proceeding, which states: [16]

> . . . I was fully committed to integrate myself into Angeles Broadcasting Network's operation of Channel 30 at San Bernardino, California until actions unilaterally, taken without me, by Angeles made it evident that true integration of the kind promised the Commission would be impossible of effectuation.

Maranatha interprets this to mean that Rev. Barnard was never integrated into management as promised and that Angeles delayed disclosing this matter until after it initiated interim operation, to make it harder for the Commission to terminate Angeles' authority. In further support of its allegations, Maranatha observes that Rev. Chambers signed a programming contract on January 17 and Angeles' license application on February 6, rather than Rev. Barnard, who had previously played the leading role in Angeles. Maranatha points out that pursuant to the January 17 contract, with Delores Press, Inc., Angeles provides 28 hours of programming time daily to Dr. W. Eugene Scott, the head of Faith Center, Inc., the former licensee of Channel 30, in return for use of Faith's broadcast facilities. [17]

15. Angeles responds that Maranatha has not justified adding an issue. Angeles submits that the Watson and Williams affidavits are unreliable since Watson and Williams are litigants biased against Angeles and their claims are hearsay. Additionally, Angeles contends that Rev. Barnard's statement contains no information which Angeles did not voluntarily disclose. Angeles also argues that it had no motive to delay reporting or to misrepresent the facts concerning Rev. Barnard's departure.

16. We decline to pursue this matter further, since the record fails to support Maranatha's allegations that Rev. Barnard withdrew prior to February 15, as voluntarily reported by Angeles. The Williams and Watson affidavits are hearsay and vague as to the nature of the "action" allegedly taken against Rev. Barnard by the other directors. Rev. Barnard's above statement is wholly lacking in detail and does not state that Rev. Barnard had already terminated his relationship with Angeles. Similarly, while the fact that Rev. Chambers signed important documents prior to February 15 may reflect a dispute between Rev. Barnard and the other principals, it does not indicate that Rev. Barnard had already formally severed his relationship with Angeles, which would have been a reportable event. Moreover, we do not find persuasive Maranatha's argument that Angeles had a strong motive to conceal a January departure. Angeles could have reported an earlier withdrawal after judicial appeals had been filed and after commencing interim operation and still have complied with the Commission's reporting Rules. In the absence of

a substantial and material question as to whether Rev. Barnard had withdrawn prior to the date reported by Angeles no justification exists for further inquiry.

17. Maranatha's newest allegations against Angeles are raised in an opposition pleading. Because the Commission's Rules require that new factual allegations be made in a separately filed motion to enlarge issues we would ordinarily dismiss these allegations without consideration. [18] However, since we do not wish to delay this matter further and since the allegations are defective in other respects we will dispose of them here.

18. The first of these arises from allegations made by Angeles against Maranatha in its Petition to Vacate Grant, Reopen the Record and Enlarge the Issues. As previously noted, the allegations against Maranatha are moot, since Mara*atha's application will be denied on other grounds. However, we will recite the allegation to provide the factual predicate for Maranatha's allegations against Angeles. Angeles accuses Maranatha's principal William Welty of abusing the Commission's processes and committing forgery by failing to reveal that he was the real party in interest or was otherwise substantially involved in the filing of another application in this proceeding; that of United Minority Broadcasting of San Bernardino, Inc. (United), which was nominally controlled by Janet and Jonathan Bowler. The United application was dismissed by the Review Board after United failed to prosecute it. Angeles bases its allegations on an affidavit by a private investigator named Edward R. Trivers, who states that he interviewed the Bowlers in December 1985. He recites that the Bowlers declined to submit a statement but were willing to be deposed.

19. Maranatha responds that Angeles has likewise abused the Commission's processes and committed misrepresentations in raising these allegations. Maranatha notes that the Bowlers have sent a letter to the Commission complaining about Trivers' investigatory practices and denying the accuracy of statements made in Trivers' affidavit. [19] Maranatha contends that Angeles should be held strictly accountable for any investigatory misconduct or misrepresentations made by Trivers.

20. We agree with Angeles that the Bowlers' letter does not provide a sufficient basis for further inquiry into this matter. The Commission's Rules require that motions to enlarge issues must be supported by a sworn statement from an individual with personal knowledge. [20] The Bowlers' letter is not only unsworn but is incomplete on its face. According to the Bowlers:

> A point by point discussion of the inaccuracies of [Trivers'] affidavit is not within the scope of this letter and would be dealt with in a deposition should that become necessary.

By contrast Trivers unequivocally stands behind his original affidavit and repudiates the Bowlers' letter in a second affidavit. We decline the Bowler's suggestion that the Commission should seek to obtain definitive information from them. In the absence of a complete sworn statement from the Bowlers in support of Maranatha's contentions, we see no need for further inquiry into this question.

21. A second matter concerns Angeles' interim operation. Pursuant to the Designation Order in this proceeding, Angeles is required to comply with several conditions. [21] These are as follows. (1) The interim operator must compute its net profits by generally accepted accounting principles and distribute them to noncommercial educational broadcast interests or charities. Eighty percent of accumulated net profits must be distributed every three months and the rest on dissolution of the interim operation. (2) After construction and commencement of operations the interim operator must receive prior Commission approval for capital expenditures of over $1,000 and increases in salaries and other compensations to principals. (3) At six month intervals the interim operator must file a detailed accounting of its financial position including a balance sheet, a profit and loss statement, a statement of retained earnings, and a statement of changes in financial position.

22. Angeles filed financial reports on July 19, 1985 and March 11, 1986. Based on these filings, Maranatha charges that Angeles has violated the conditions imposed by the Designation Order. Maranatha contends that: (1) Angeles filed no statement of retained earnings or statement of changes in financial position, (2) Angeles' profit and loss statement was not prepared in accordance with standard accounting practice, (3) the amount and distribution of net profits cannot be determined from the filings, and (4) Angeles made capital expenditures without seeking approval or indicating the purpose of the expenditures. Maranatha argues that the intentional or careless concealment of financial information is grounds for disqualification.

23. In response to Maranatha's allegations, Angeles, on June 2, 1986, submitted a revised financial report prepared in accordance with the standards of the American Institute of Certified Public Accountants. [22] According to Angeles, this report demonstrates that it has complied with the conditions imposed by the Commission's Designation Order. Angeles claims that the interim operation has not yet accrued any net profits which would have to be distributed. Additionally, Angeles asserts that all capital expenditures made have been for initial construction, for which no prior Commission approval is needed. Angeles maintains that there is no indication that it has attempted to conceal pertinent information or evade the Commission's requirements.

24. Based on this revised report, Maranatha continues to contend that Angeles has lacked candor with the Commission and violated the financial conditions set forth in the Designation Order. Maranatha notes that Angeles did not file complete and detailed financial reports until Maranatha pointed out the deficiencies in its original filings. Maranatha further observes that Angeles did not submit its supplemental filing until 52 days after first promising to make an additional filing. [23] Maranatha also faults the preparation of the financial statement. While the statement was prepared by a certified public accountant, it was based on information compiled by Angeles' principal and not from an independent audit of Angeles' books. Additionally, Maranatha notes that Angeles did not request prior approval of the $124,919 in capital expenditures indicated by the statement and did not distribute any of the $46,038 fund balance, characterized by Maranatha as net profits.

25. Although we agree with Maranatha that Angeles' reporting practices have not been entirely satisfactory, we see no basis for questioning Angeles' basic qualifications. Angeles' initial reports were poorly prepared and could not be used to determine whether Angeles had complied with the Designation Order. However, the record before us provides no basis for believing that Angeles intended to conceal any material information from the Commission.

Rather, the record indicates only that Angeles' accounting practices were inadequate. Angeles' revised submission appears to be satisfactory. The Designation Order requires only that Angeles file a detailed accounting of its financial position. The Order does not require that Angeles obtain an independent audit.

26. Our examination of Angeles' revised submission does not disclose any violation of the conditions imposed by the Designation Order. [24] The statement indicates that Angeles made capital expenditures of $124,919, of which $66,606 was financed out of the operating revenues of the station. [25] These expenditures comprise leasehold improvements to its San Bernardino and Burbank studios ($55.601) and furniture, fixtures, and equipment ($69,318). Maranatha has presented no reason to doubt that these amounts can be reasonably characterized as initial construction expenses exempt from the requirement of prior approval. Similarly, we do not believe that Angeles was required to distribute the $46,038 fund balance reported. As previously mentioned, Angeles devoted $66,606 of its revenues toward capital expenditures, which means that as a result of these expenditures KAGL-TV had a net operating deficit of $12,690. Thus, the $46,038 fund balance represents the value of assets rather than distributable profits.

27. As a final matter, Maranatha asserts that Faith's Dr. Scott has become a real party in interest of Angeles. As previously noted, Angeles entered into an agreement with Delores Press, Inc. which gives Dr. Scott 28 hours a week of programming time in return for Angeles' use of Faith's broadcast facilities. Maranatha alleges that Dr. Scott, who was previously accused of fraudulent fundraising, continues to raise money on Channel 30 and has attacked the Commission over-the-air. According to Maranatha, Dr. Scott's conduct coupled with Angeles' inadequate financial statements indicate that Dr. Scott has taken control of Angeles.

28. Maranatha has shown no basis for adding a real party in interest issue. A real party in interest issue will be added only on a showing that a person has an undisclosed ownership interest in an application or is in a position to actually or potentially control the applicant. [26] Maranatha has shown only that Dr. Scott has traded use of the broadcast facilities for air time. Without more, this fact does not support an inference that Dr. Scott has acquired ownership or control of Angeles.

29. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed February 28, 1986 by Angeles Broadcasting Network IS DENIED. [27]

30. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed December 9, 1985 by Angeles Broadcasting Network, as supplemented March 3, 1986, IS GRANTED to the extent indicated herein and otherwise IS DENIED; that the Petitions for Reconsideration filed November 29, 1986 by Melana James and December 3, 1985 by the Honorable Mervyn Dymally and by Bradley Dale Tubin ARE DISMISSED; and that our Memorandum Opinion and Order granting reconsideration FCC 85-593, released November 8, 1985 (59 RR 2d 752) IS MODIFIED and the previously issued stay FCC 86-229, released May 9, 1986 IS VACATED.

31. IT IS FURTHER ORDERED, That the Petition for Leave to Intervene filed January 2, 1986 by Melana James IS DENIED.

32. IT IS FURTHER ORDERED, That the Petition to Vacate Grant, Reopen the Record and Enlarge the Issues filed December 20, 1985 by Angeles Broadcasting Network IS DISMISSED as moot.

33. IT IS FURTHER ORDERED, That the application of Angeles Broadcasting Network for interim authority (File No. BPCTI-830418KG) IS GRANTED and the application of Maranatha Broadcasting Co., Inc. (File No. BPCTI-830419KG) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] FCC 83-439, released October 4, 1983.

[2] *Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235, released May 12, 1981, *aff'd per curiam*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1188 (1983).

[3] FCC 84-495, released November 26, 1984, *recon. denied*, FCC 85-126, released March 19, 1985. *See also Angeles Broadcasting Network*, 96 FCC 2d 5 (Rev. Bd. 1984). Other applications filed in this proceeding have been dismissed.

[4] FCC 841-42, released April 16, 1984.

[5] *Maranatha Broadcasting Co., Inc.* v. *FCC*, No. 84-1618 (D.C. Cir. December 21, 1984). A related appeal by a prospective intervenor, Melana James, *James* v. *FCC*, No. 84-1626 (D.C. Cir. December 26, 1984), has been consolidated. Order, February 11, 1985.

[6] Letter from Morton L. Berfield to William J. Tricarico, Secretary FCC (April 8, 1985).

[7] Rev. Chambers' wife Beverly was elected secretary-treasurer in place of her husband. Rev. Chambers now serves as general manager of the interim operation, Beverly Chambers serves as station manager, and Anthony serves as business manager.

8 *Angeles Broadcasting Network*, 59 RR 2d 752 (1985).

[9] FCC 86-229, released May 9, 1986, which extended a more limited stay granted by *Angeles Broadcasting Network*, 59 RR 2d 758 (1985).

[10] Our experience in this proceeding and others has raised serious questions about our procedure for selecting interim operators. Contrary to our expectations, these proceedings have consistently involved protracted delay and uncertainty. These difficulties frustrate the primary goal of interim proceedings of ensuring continuity of service. They mire the proceeding in a comparison of differences between the applicants which are not meaningful in this context. In those markets where an interim operator may be necessary to ensure adequate diversity of service, we will consider whether to propose use of a lottery to select an interim operator without recourse to hearing procedures.

[11] Letter from Timothy D. Waisanen and Vera E. Waisanen to William J. Tricarico, Secretary FCC (January 21, 1986); FCC 86I-88, released July 16, 1986.

[12] Portions of Angeles' Petitions deals with Maranatha's financial qualifications and site availability. No justification exists for further inquiry into these matters at this stage of an interim proceeding in light of the disparity in the applicants' comparative qualifications.

[13] The Petitions by Rep. Dymally, James, and Tubin make several unsupported allegations against Maranatha. These include allegations that: (1) Rev. Barnard has become a principal of Maranatha and (2) Maranatha intends to conduct the interim

operation as a commercial station. Petitioners fail to support these allegations with any substantial evidence. Such unsupported assertions do not rise to the level of specific factual allegations sufficient to support a claim of interest justifying the filing of a petition for reconsideration. See *Angeles Broadroadcasting Network*, FCC 85-126, released March 19, 1985. We will also deny Melana James' Petition for Leave to Intervene based on similar deficiencies.

[14] All of the pertinent allegations fall generally under the rubric of "character." In *Character Qualifications*, 102 FCC 2d 1179, 1230-32 (1986), the Commission abolished its former practice of imposing comparative demerits based on character defects. For this reason, the various allegations concerning Angeles and Maranatha now have relevance only to the basic qualifications of the applicants. In applying the policy statement, we note that because the character related allegations are being raised for the first time in this proceeding, we will treat them as in any other case currently pending before the Commission. *See* 102 FCC 2d at 1235.

[15] *See Dennis F. Doelitzsch*, 44 RR 2d 1241 (1978); CBS, Inc., 57 FCC 2d 503 (Rev. Bd. 1976).

[16] Statement of Information filed July 22, 1985 by Rev. Gerald G. Barnard.

[17] Maranatha speculates that Rev. Barnard's aversion to this arrangement precipitated his withdrawal from Angeles. *See* Reply Comments of Maranatha Broadcasting Co., Inc., filed August 6, 1985 at 3 n.3.

[18] *See Midwest Television, Inc.*, 1 FCC 2d 1184, 1187 (Rev. Bd. 1984); *Milam & Landsman*, 4 RR 2d 463, 466 (Rev. Bd. 1964); Section 1.229 of the Commission's Rules.

[19] Letter from Jonathan and Janet Bowler to Jack D. Smith, General Counsel FCC and William J. Tricarico, Secretary FCC (March 19, 1986).

[20] *See Eastern Broadcasting Corp.*, 29 FCC 2d 472, 474-75 (Rev. Bd. 1971); *Seven (7) League Productions, Inc. (WIII)*, 3 FCC 2d 227, 228 (Rev. Bd. 1966); Section 1.229(d) of the Commission's Rules.

[21] FCC 83-439 at para. 18.

[22] Most significantly, the revised report was based on the accrual as opposed to cash basis of accounting. Additionally, the revised report contained in addition to a balance sheet and a statement of changes in fund balance, a statement of changes in working capital.

[23] In an April 11, 1986 pleading, Angeles represented that it had requested its accountant to prepare revised reports. The supplemental report was filed June 2.

[24] Because of the unusual procedural stance of this case we have examined Maranatha's allegations concerning the reports. Ordinarily, however, reports such as this would be reviewed by the Mass Media Bureau outside of the adjudicatory context.

[25] Angeles' principals contributed $32,000 toward these expenditures and $26,313 remains due.

[26] *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).

[27] Angeles contended that Maranatha had ceased to prosecute its application. It is apparent that Maranatha continues to prosecute.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of

WALT-WEST
ENTERPRISES, INC.

	File Nos.
For Renewal of License of	BRH-790327UA
Station WYEN(FM),	BRH-790731UT
Des Plaines, Illinois	BRH-820802ZK

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1986 **Released: October 24, 1986**

By the Commission: Commissioner Dennis not participating.

1. The Commission has before it: (i) a petition, filed May 9, 1986 by the National Black Media Coalition (NBMC or petitioner), seeking reconsideration of a Memorandum Opinion and Order (Order), FCC 86-139, released April 9, 1986, renewing the license for station WYEN(FM), Des Plaines, Illinois, subject to EEO reporting conditions; (ii) the licensee's opposition; and (iii) NBMC's reply. Our Order followed a remand from the court of appeals[1] which reversed our decision to grant unconditionally the license renewal applications for WYEN(FM).[2] The court held that we had impermissibly used post-term EEO improvements as a basis for evaluating the license term EEO performance.

2. In our Order, we reviewed WYEN(FM)'s EEO record for the license terms at issue. Our review disregarded the station's improvements following our 1982 decision (see note 2, supra). Based on that review, we held that the station's record warranted license renewal, subject to the submission of semi-annual EEO progress reports for the remainder of the 1982-1989 license term.

3. NBMC contends that we erred by failing to conduct an investigation, and by concluding that the station's record, including the station's post-remand submissions, did not raise a substantial question of intentional discrimination or an intentional failure to follow our EEO rule. Accordingly, it requests that the Commission conduct a full investigation of the licensee's performance during the 1976 - 1979 and 1979 - 1982 license terms and, then, designate the application for an evidentiary hearing.

4. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order, or raises additional facts not already considered. Section 1.106 of the Commission's Rules; Mississippi Authority for Educational Television, 84 F.C.C. 2d 349, 351 (1981). NBMC claims that material errors were made. We disagree.

5. Citing Bilingual Bicultural Coalition on the Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978) (Bilingual), NBMC argues that WYEN's record raises an inference of discrimination which cannot possibly be resolved in light of the present record. NBMC, therefore, concludes that an investigation should have been conducted. NBMC ignores, however, that the record is replete with the kind of information normally obtained by the Commission in investigating EEO matters, including much of the information sought in Bilingual, supra. Pursuant to Commission orders issued in 1978[3] and 1982,[1,4] the licensee supplied detailed reports of its EEO efforts during most of the 1976 - 1979 and 1979 - 1982 license terms. These reports listed all persons hired by race and gender, and included a detailed description of recruitment methods utilized to increase the pool of minority applicants for each position.[5] They demonstrated that prior to the time when the station's renewal applications were held in abeyance,[6] the licensee had recruited, hired and promoted minorities, but its recruitment efforts were not continuous. Contrary to NBMC's assessment of these efforts,[7] we found that while they did not justify an unconditional grant of renewal, neither did they raise a substantial question of intentional discrimination or of an intentional failure to obey our rules.[8] Hence, it was necessary to decide what sanction should be imposed to ensure full compliance. In determining which would be the appropriate remedy, we have considered the licensee's post-term efforts,[9] and we are satisfied that semi-annual reporting requirements are sufficient. 10 In sum, we believe no material errors were made in the Order.

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by the National Black Media Coalition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *NBMC v. FCC*, 775 F.2d 342 (D.C. Cir. 1985).

[2] *Walt-West Enterprises, Inc.*, 98 F.C.C. 2d 844 (1984). *See also, Chicago Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1031, 1042-43 (1982).

[3] Letter to Edward W. Piszczek, adopted February 22, 1978, mailed April 5, 1978.

[4] *Chicago Metropolitan Broadcast Stations, supra* note 2.

[5] These reports were before the court in *NBMC v. FCC, supra* note 1. They show that minorities were hired for announcing, sales and office positions and that eight minorities (five full-time and three part-time) were hired during a four year period (April 1978 to April 1982) beginning with the Commission letter to the licensee (Letter to Edward W. Piszczek, *supra* note 3) and ending with the abeyance decision (*Chicago Metropolitan Broadcast Stations, supra* note 2).

[6] This period was to begin April 27, 1982 and to end subsequent to the receipt of an EEO report due April 15, 1983. *Chicago Metropolitan Broadcast Stations, supra* note 2.

[7] In addition, unlike NBMC, we find that WYEN's unsolicited post-remand submission added nothing of substance relative to the issues raised by the licensee's EEO record. It did nothing more than reaffirm our earlier opinion that the station's finances and location were not significant barriers to the licensee's ability to obtain applications from minorities.

[8] As we have demonstrated above and in our Order, the licensee did follow our rules, albeit sporadically, and did supply documentation concerning its efforts. The record before the court contains numerous copies of newspaper advertisements used by the licensee in its efforts to apprise potential minority applicants.

[9] Those efforts are detailed in *Walt -West Enterprises, Inc., supra* note 2 at 849.

[10] In this regard, we note that while we have not considered post-term efforts in deciding whether a sanction should be imposed, it is our policy to consider post-term efforts in determining what kind of sanction would be appropriate in a particular case. *See KDEN Broadcasting Company*, FCC 85-214, released April 30, 1985, *aff'd without opinion sub nom. National Black Media Coalition v. FCC*, No. 85-1317 (D.C. Cir. May 14, 1986); *Texas Broadcast Renewals*, 99 F.C.C. 2d 377, 383 (1984), *citing Northern Television Inc.*, 91 F.C.C. 2d 305, 324 (1982), *aff'd sub nom. Alaskans for Better Media v. Federal Communications Commission*, No. 82-2144 (D. C. Cir. May 16, 1984).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

BELL BROADCASTING COMPANY (WCHB)
Inkster, Michigan — MM DOCKET NO. 84-538
File No. BP-8O1119AA

LAWRENCE COUNTY BROADCASTING CORPORATION (WBZY)
New Castle, Pennsylvania — MM DOCKET NO. 84-540
File No. BP-810105AA

For Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1986; Released: October 24, 1986.

By the Review Board:.

1. In this proceeding, Bell Broadcasting Company (Bell), licensee of AM station WCHB, Inkster, Michigan, sought authority to change its operation from the frequency 1440 kHz, with power of 1 kW unlimited time, to 1200 kHz with power of 1 kW night and 50 kW day, whereas Lawrence County Broadcasting Corporation (Lawrence County), licensee of AM station WBZY, New Castle, Pennsylvania, applied to change its facilities from the frequency 1140 kHz, with power of 5 kW, daytime only, to 1200 kHz with power of 10 kW day and 1 kW night, using a directional antenna during nighttime hours. Although the Bell and Lawrence County applications are for communities that are well- separated geographically, they are mutually exclusive because their simultaneous operation would result in prohibited signal overlap during daytime hours. Accordingly, the applications were set for hearing on an issue to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal or combination of proposals would best provide a fair, efficient, and equitable distribution of radio service. [1] In his Initial Decision, FCC 86D-8, released February 12, 1986, Administrative Law Judge Joseph Gonzalez determined that Lawrence County was the preferred applicant under this issue.

2. Bell filed exceptions in the ordinary course and Lawrence County replied and also filed limited exceptions. At the May 23, 1986 oral argument, however, the Board explored with the parties the possibility of agreeing to a modification of their proposals in order to remove the engineering conflict so that both applications might be granted. Oral Arg. Tr. 61-2, 86-7, 96. Indeed, the Board thereafter met *in camera* with the parties in an effort to mediate the positions of the parties with an eye towards eliminating the- mutual exclusivity of the two proposals so that the citizens of both Inkster and New Castle could enjoy the benefits of improved radio service. In a series of amendments and supplements filed August 15, August 18, and September 9, 1986 by Bell, and August 8 and September 11, 1986 by Lawrence County, the parties did in fact modify their proposals. In brief, Lawrence County reduced from 10 kW to 5 kW the daytime power it requested for WBZY and Bell reduced form 50 kW to 25 kW the daytime power it originally sought for WCHB. Bell also modified its directional antenna system. Neither applicant proposed a change in its nighttime operation.

3. The Board has examined the proffered amendments including the respective engineering showings and concludes that good cause exists for their acceptance. The amendments eliminate the mutual exclusivity that now exists between the applications and also comply with the Commission's rules because they do not create new interference or require any rule waivers. In comments filed September 23, 1986, the Mass Media Bureau, after studying the engineering showings, concurred that the amendments should be accepted. The public interest will be served by this action because it terminates the proceeding and permits the expeditious grant of both the Inkster and New Castle applications.

4. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed August 8, 1986 and supplement thereto filed September 9, 1986 by Lawrence County Broadcasting Corporation ARE GRANTED, and the amendments ARE ACCEPTED, and the further petition for leave to amend filed September 8, 1986, by Bell Broadcasting Company, which superseded and replaced its petitions for leave to amend filed August 15 and August 18, 1986, IS GRANTED and the amendment IS ACCEPTED; and

5. IT IS FURTHER ORDERED, That the application of Bell Broadcasting Company (File No. BP-801119AA) for a construction permit for a change in facilities of WCHB, Inkster, Michigan IS GRANTED; and the application of Lawrence County Broadcasting Corporation (File No. BP-810105AA) for a construction permit for a change in the facilities of WBZY, New Castle, Pennsylvania IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs
Member, Review Board

FOOTNOTE

[1] *Hearing Designation Order*, Mimeo MM 4531, released June 7, 1984. Originally, five other applications for widely scattered communities were designated for hearing with those of Bell and Lawrence County; however, by *Memorandum Opinions and Orders*, FCC 85M-054 and FCC 85M-713, released January 7, 1985 and February 14, 1985, respectively, the presiding judge severed the other applications from this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

Yakima Valley
Cablevision, Inc.

Petitioner

UNITED STATES
COURT OF APPEALS
for the
District of Columbia Circuit

v.

Federal Communications Commission,

Respondent

Case No. 85-1464
and
Consolidated
Case No. 86-1665

Board of Supervisors
of Fairfax County, Virginia, *et al.*,

Intervenors

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1986 **Released: October 24, 1986**

By the Commission:

1. In this *Memorandum Opinion and Order* we address the decision of the court in *Yakima Valley Cablevision , Inc . v . FCC*, No. 85-1464 (D.C. Cir. July 8, 1986),[1] which remanded to the Commission those cases involving cable television franchise fee disputes, which arose prior to the enactment of Section 622 of the Cable Communications Policy Act of 1984,[2] and which had been dismissed by the Commission in *Order*, Mimeo No. 1442 (released December 19, 1984), *review dismissed*, FCC 85-372 (released July 19, 1985). We also respond herein to the court's recent order, *Yakima Valley Cablevision, Inc. v. FCC*, No. 84-1464 (D.C. Cir. Sept. 18, 1986) (order directing response), directing the Commission to state what action it has taken or intends to take with respect to the remand decision.[3] Our response here will cover the petitioners before the court and any intervenors.

2. The court's remand decision found the Commission's refusal to resolve petitioners' franchise fee disputes to have been arbitrary and capricious in light of the absence of a persuasive rationale for the change in policy. The Commission had expressed its view that passage of the Cable Communications Policy Act of 1984, 47 U.S.C. Section 542 (Supp. II 1984), which had established a statutory franchise fee limit, rendered moot previously pending proceedings relating to the Commission's franchise fee rule. *Report and Order in MM Docket 84- 1296*, 58 RR 2d 1, 23 n. 55 (1985) (Implementation of the Cable Act). The court concluded, however, that the Cable Act "unambiguously" declares a prospective effective date, *Yakima Valley Cablevision, Inc. v . FCC*, slip op. at 20, and noted that the "courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature." Id. at 16. Although the court, in a "postscript" to its opinion declined to rule out the possibility that the Commission's subsequent elaboration of its view on this matter (*Memorandum Opinion and Order in MM Docket 84-1296*, 60 RR 2d 514 (1986)) might establish a rationale adequate to pass judicial scrutiny, we believe that the public interest would now be best served, and the goals of administrative convenience and dispatch furthered by ruling on these pre-Act disputes and putting an end to further litigation concerning this point. This will serve to separate, as the court has directed in its September 18 order, the pre-Act issues from post-Act situations, which will be resolved separately in *American Civil Liberties Union v. Federal Communications Commission*, No. 85-1666 (D.C. Cir. filed May 3, 1985), and consolidated cases.

3. Accordingly, the Commission will review the pre-Act franchise fee cases appealed to the court which have been remanded to the Commission. Consideration will also be given to intervenors in those proceedings seeking review of these pre-Act disputes. In order to assure that all matters on file are current, parties to these cases will shortly be instructed how to refile, including any information and data which they believe to be pertinent to a resolution of the disputed matters. We shall expect all parties to plead with specificity any matters relating to those items which they believe to be relevant, including--but not limited to--any other payments in addition to franchise fees set forth as a percentage of gross revenues (*e.g.*, separate cash payments for public access programming).

4. We will not, however, review those cases in which the only issue in dispute is the legitimacy of a franchise fee of between 3 and 5 percent, whether such fees have actually been paid or the money has been placed in escrow accounts. As the court noted in, *Yakima Valley Cablevision, Inc. v. FCC*, slip op. at. 19-20, Congress has specifically excepted pre-Act payments of up to 5 percent from our former limitations. The court notes that "[t]he Conference Report for the Cable Act makes it clear that any payments of franchise fees already made by a cable system up to five percent would be lawful without FCC permission if the franchise agreement established such a fee" Id. at 19. These cases, therefore raise no cognizable dispute. Nor will we address contractual issues that are outside the scope of former Section 76.31 of the Commission's rules. Rather, we will adjudicate only the issue of whether a given franchise fee, including all forms of consideration, is greater than five percent of the franchisee's gross revenues per year and is thus unlawful. All other contractual disputes including the constitutionality of franchise fees generally, are clearly within the province of the judicial branch. *See, e.g., Erie Telecommunications, Inc. v. City of Erie*, C.A. No. 85-185 Erie (W.D. Pa., filed July 16, 1985).

5. Accordingly, IT IS ORDERED, that the Commission's decision dismissing the order noted in paragraph 1 is reversed and it will review those cases remanded by the United States Court of Appeals for the District of Columbia Circuit in *Yakima Valley Cablevision, Inc. v. FCC*, No. 85-1464 (D.C. Cir. July 8, 1986), to the extent indicated in paragraphs 3 and 4, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Consolidated with this case is that of *Connecticut Cable Television Association, Inc. v. FCC*, No. 85-1665 (D.C. Cir. July 8, 1986).

[2] 47 U.S.C. Section 542.

[3] This court order was issued in response to a petition for rehearing filed by Yakima Valley Cablevision, Inc. and the Connecticut Cable Television Association, seeking clarification of the court's decision as it affects pre-Cable Act cases.

GUIDE TO USING THE FCC RECORD INDEX

The FCC Record index is organized numerically. Terms will appear on a biweekly basis in ascending numerical order based on the organizing concepts discussed below. Each term will be followed by numbers that refer to the first page of each document that deals with the term **(The page numbers do not reflect the specific page of the FCC Record where the issue is discussed)**. A cumulative index will be published every four months based on the same organizing principle.

Terms are selected by the author or authors of the document based upon a determination of the major issues in the decision. The author will first attempt to index the document with numbers and terms from Title 47 of the Code of Federal Regulations (CFR). Researchers should familiarize themselves with the form and content of the CFR as this publication is the primary basis of Commission decisions and is therefore the source of the majority of the index terms in the FCC Record.

Only if the document cannot be categorized under a relevant CFR term will the author use other terms based on statutes, supplementary adjudicatory phrases, and other titles of the CFR. Generally, each document will be indexed under one (1) to five (5) terms.

Numbers 0-299: Commission Rules Index Terms

Index terms preceded by the numbers "0" to "299" correlate exactly with the Commission's Rules as codified in the Code of Federal Regulations, Title 47, or published on a daily basis in the Federal Register. A Master Index of terms is published in the inaugural FCC Record and consists of the CFR terms as they appear in the various table of contents that precede each part in Title 47 of the CFR (October 1, 1985 version). A new Master Index will be printed each year when the CFR is updated. However, additional terms may appear in the index as rules are created or modified between CFR updates.

EXAMPLES

1.411 Commencement of rulemaking proceedings. (refers to 47 CFR section 1.1411)
73.1940 Broadcasts by candidates for public office. (refers to 47 CFR section 73.1940)

Number 300: Communications Act of 1934 Index Terms

Index terms preceded by the number "300" refer to sections of the Communications Act of 1934, as well as other laws, codified at Title 47 of the United States Code. The particular sections of the laws appear following the decimal point.

EXAMPLES

300.203 Schedule of Charges (refers to 47 U.S.C. section 203)
300.706 War Emergency-Powers of the President (refers to 47 U.S.C. section 706)

Number 400: Other Statutory Index Terms

Index terms preceded by the number "400" refer to titles and sections of other federal statutes as codified in the United States Code. Both the title and section of the statute appear following the first decimal point.

EXAMPLES

400.05.553 Rule making (refers to 5 U.S.C. section 553)
400.18.1304 Broadcasting of Lottery Information (refers to 18 U.S.C. section 1304)

Number 500: Adjudicatory Index Terms

Index terms preceded by the number "500" refer to the additional list of key terms to be published as a list of Adjudicatory Index Terms (this list is now being prepared and will be published shortly). These terms are used in formal hearing decisions of the Commission or its staff when either a CFR or statutory term is not on point. Researchers should be aware that if a CFR citation or statutory citation is used as an index term in an adjudicatory document, the "500" designator will not appear preceding the term. The term would follow the format set out under Numbers "0 to 400" and "600." For the researchers' convenience, the "500" number is further divided to identify the type of document or office from which the decision emanates. These numbers are:

500.1 _ _ _ Hearing Designation Order/ Show Cause Order/ Notice of Apparent Liability
500.2 _ _ _ Administrative Law Judge Decisions
500.3 _ _ _ Review Board or Commission Decisions

EXAMPLES

500.2006 Abuse of process (refers to law judge decision).
500.3085 Integration of ownership into management, qualitative (refers to Review Board Decision).

Number 600: Other Code of Federal Regulations Index Terms

Index terms preceded by the number "600" refer to rules taken from titles of the Code of Federal Regulations other than Title 47 (the FCC rules). Both the title and rule section appear after the first decimal point.

EXAMPLE

600.31.10.31 Negotiation of taxpayer refund checks (refers to 31 C.F.R section 10.31)

We invite your comments or questions concerning the indexing system. These should be addressed to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

SUGGESTED RESEARCH TECHNIQUE

The index to the FCC Record is divided into two parts. The first part consists of a Master Index of terms that are keyed to the Code of Federal Regulations, 47 C.F.R. Parts 0-199. (The Master Index is set out in Volume 1, Number 1 of the FCC Record. It replicates the table of contents terms preceding each Part of Title 47 of the C.F.R.) The second part contains a list of only those terms associated with Commission decisions released during the two week period (a cumulative index will be published every four months). This part also identifies the first pages of the applicable documents as they appear in the biweekly FCC Records.

To locate a document published in the FCC Record or to research a term as it is applied in Commission decisions, simply review the first part of the index (i.e., the Master Index of terms) as well as supplementary lists of terms (for statutes and adjudication) to determine the key number and location of the applicable term. The Master Index of Terms is divided into three subsections that generally mirror Parts 0-199 of Volume 47 of the C.F.R. The first subsection list the Parts only. The second subsection lists the Parts and Subparts. Finally, the third subsection lists the Parts, the Subparts and the Sections of the rules. Use these subsections to narrow your search to a particular key number (i.e., Section of the rules) in the index. Terms not keyed to the C.F.R. are set fourth on supplemental lists or are keyed to the United States Code.

Once you have narrowed your search to a particular key number, locate that key number in the second part of the index. Immediately following that key number and term is a page number corresponding to the FCC Record. This page number identifies the first page of a document dealing with that issue.

ADJUDICATORY INDEX TERMS

500._005	integration of ownership into management, qualitative aspect
500._010	integration of ownership (qualitative), broadcast experience
500._015	integration of ownership (qualitative), civic participation
500._020	integration of ownership (qualitative), female ownership participation
500._025	integration of ownership (qualitative), local residence
500._030	integration of ownership (qualitative), minority ownership participation
500._035	integration of ownership into management, quantitative aspect
500._040	integration of ownership into management, questions regarding effectuation
500._045	diversification of control of mass media
500._050	cross interest
500._055	auxiliary power
500._060	broadcast record
500._065	comparative coverage
500._070	efficient use of frequency

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NOTE TO USERS: This supplemental list of index terms is intended to aid researchers of adjudicatory documents issued by the bureaus, Office of Administrative Law Judges, Review Board, and the Commission. The terms will be used by FCC staff if a document is not indexable to a CFR or statutory term. Additional terms will be added as necessary.

These index terms will always be preceded by the number "500" in the biweekly and cumulative index to identify the underlying document as adjudicatory in nature.

500.1xxx Hearing Designation Orders, Show Cause Orders, Notices of Apparent Liability
500.2xxx Administrative Law Judge Decisions
500.3xxx Review Board or Commission Decisions

An adjudicatory document may also be indexed under a CFR or statutory term. In those instances, the identifying number will not be "500", but the number associated with those terms (See Guide to Using the FCC Record Index)

500._075	programming, comparative
500._080	renewal expectancy
500._085	307b, distribution of broadcast facilities
500._090	noncommercial educational
500._095	character qualifications
500._100	abuse of process
500._105	anti-competitive practices
500._110	failure to prosecute
500._115	ineptness
500._120	licensee responsibility
500._125	misrepresentation and lack of candor
500._130	programming, discriminatory
500._135	real party in interest
500._140	short term renewal
500._145	air hazard
500._150	alien ownership
500._155	channel, spacing
500._160	dual city licensing or identification
500._165	environmental impact
500._170	financial qualifications
500._175	satellite operation
500._180	site availability or suitability
500._185	staffing issue
500._190	attorneys, improper conduct
500._195	evidentiary privilege
500._200	reopening of record

500._205	res judicata
500._210	standing
500._215	constitutional issue
500._220	limited partnership
500._225	maritime service, shipboard violations
500._230	construction and loading
500._235	frequency, unauthorized
500._240	comparative consideration, private radio
500._245	multipoint distribution service, comparative
500._250	public land mobile service, comparative
500._255	need showing (common carrier)
500._260	HDO (lead party) (city, state)

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